

No. 15820

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United States  
Court of Appeals  
for the Ninth Circuit

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BOSTON INSURANCE COMPANY, a corporation,  
Appellant,

vs.

HYRUM JENSEN, individually and doing business as Eureka Lumber Company, Appellee.

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Transcript of Record

(In Two Volumes)

Volume II.

(Pages 301 to 610, Inclusive)

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Appeal from the United States District Court  
for the Northern District of California,  
Northern Division

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PAUL P. O'BRIEN, CLERK



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“PAUL HENNING

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Q. (By Mr. Hilger): Would you state your name, please? “A. Paul Henning.

“Q. Where do you reside, Mr. Henning?

“A. 1534 Harrison Avenue, Eureka.

“Q. What is your trade or occupation?

“A. Manager of the Rice Supply Company.

“Q. Where do you have your office for that work? “A. Number One Second Street.

“Q. Is that a branch office of a larger outfit?

“A. Yes, it is.

“Q. You maintain the invoice records, that sort of thing, for your sales here at this office or is that done elsewhere?

“A. That's done in the San Rafael office.

“Q. What type of merchandise does your firm sell? “A. Building materials.

“Q. Well, would you give us a few examples of items that the—the majority of items that would be included [293] in your line?

“A. Well, almost anything that is used in the construction of a building, plywood, roofing, paint, anything that would go in the construction of a building.

“Q. Does that include builder's hardware?

“A. Builder's hardware, floor coverings.

“Q. Would it include sheet rock?

“A. Sheet rock.

“Q. In the conduct of your business have you

(Deposition of Paul Henning.)

had occasion to deal with the Eureka Lumber Company?      “A. Yes, we did.

“Q. What?      “A. Yes, we did.

“Q. Was he a customer of your firm?

“A. Yes, he was.

“Q. What basis do you make sales on, wholesale or retail?      “A. Wholesale only.

“Q. And that was the basis of your sales to the Eureka Lumber Company?

“A. Yes, it was.

“Q. You have been asked to provide certain—or, rather, provide invoices covering the purchases of the Eureka Lumber Company from your firm?

“A. Yes. [294]

“Q. And you have handed me a sheaf of invoices. Are those the invoices covering the sales to the Eureka Lumber Company?

“A. Yes, they are.

“Q. Now do you know what period these apply to?

“A. Yes. They apply from the first—they apply to the first six months of 1956.

“Q. Did you make sales to the Eureka Lumber Company prior to 1956?      “A. Yes, we did.

“Q. Have you ever been in the Eureka Lumber Company warehouse plant or building prior to the date of the fire?      “A. Yes.

“Q. Did you often go there?

“A. Approximately once a month.

“Q. Did that begin prior to 1956?

“A. Yes, it did.

(Deposition of Paul Henning.)

“Q. And when was the last time before the fire that you were in the plant or warehouse of the Eureka Lumber Company?

“A. Approximately a week before.

“Q. And at that time what part of the premises did you visit?

“A. Oh, the main building, the main office.

“Q. Did you go into their warehouse or——

“A. (Int’g.) Yes, it was part of their main building.

“Q. Did you observe any of their stock at that time?       A. Yes.

“Q. How long have you been employed with the Rice Supply Company?

“A. Four years with Rice Supply.

“Q. Has that been in Eureka?

“A. Yes, uh huh.

“Q. What line were you in before then?

“A. I was with the J. B. Rice Company, which was a retail branch prior to that.

“Q. Dealing in the same merchandise?

“A. Same merchandise.

“Q. As the result of your experience in your company were you familiar with the market values of the materials which your company sold?

“A. Yes.

“Q. In the Eureka area in June of 1956?

“A. Yes.

“Q. Let’s see. Who has the exhibit? Now I am going to show you the photostatic copy of a proof of loss marked as plaintiff’s exhibit one in

(Deposition of Paul Henning.)

connection with the affidavit of Mr. Whittet, and refer to the Exhibit A attached to it. Looking at page one of the exhibit, which of those items on page one, if any, would have [296] been supplied through your firm or carried by your firm?

“A. Well, possibly the last item, the medicine cabinet.

“Q. Your company carries and sells medicine chests and cabinets?

“A. Yes, we do.

“Mr. Castro: New or used?

“The Witness: New, when we sell them.

“Mr. Castro: This is indicated as a used one.

“Mr. Hilger: Is that correct?

“A. Yes, it does say used. We don't deal in any used merchandise, it's all new.

“Q. All right. Now refer to page two of Exhibit A and tell us if there is any of the items on that page that your firm ordinarily carries and supplies to customers?

“A. I might state this sheet rock on here.

“Q. That's about the middle of the page?

“A. That's the middle of the sheet. Now we don't supply it ourselves, but we are distributors for the Fibreboard Paper Products and we handle the billing—not the billing, but we handle the sales of it, but the bills are direct from Fibreboard Paper Products.

“Q. Did you make any sales of that product to Eureka Lumber Company just prior to the fire?

“A. We have sold them LCL. In other words,

(Deposition of Paul Henning.)

a small shipment, we stock it in the warehouse and if they pick it up from us it's an LCL shipment, but normally it's bought in full cars directly from the Fibreboard people.

"Q. Do you have any personal recollection or knowledge of any sale of sheet rock or arrival of a sheet rock shipment that Eureka Lumber Company had just prior to the fire?

"A. Yes. They received a carload of rock from Fibreboard approximately thirty days, I'd say, or within thirty days prior to the fire.

"Q. How many sheets would be in a carload of sheet rock?

"A. A carload of sheet rock is between twelve hundred and fourteen hundred sheets.

"Q. Then are you familiar with the price of the sheet rock and value of sheet rock in June of 1956?

"A. Yes, I am. The LCL price of sheet rock then was fifty-four fifty a thousand.

"Q. Fifty-four dollars and fifty cents a board foot?

"A. Per thousand square feet, and the LCL or the sheet rock that would have been picked up out of our warehouse, well, that's what it would have been, fifty-four fifty; if they had got it in carloads it would have been forty-seven fifty. [298]

"Q. Per thousand?

"A. Per thousand square feet.

"Q. Per thousand square feet, that's not board feet?        A. That's square feet.

(Deposition of Paul Henning.)

“Q. How many square feet are there in a sheet?

“A. Thirty-two square feet, thirty-two square feet per sheet, that is a four by eight piece.

“Q. You say the carload price is——

“A. (Int’g.) Forty-seven fifty per thousand.

“Q. Four and three-quarters cents per foot?

“A. Yes.

“Q. That would produce a price of or a value of a dollar fifty two per sheet, is that a reasonable accurate price for value at that time?

“A. That would be correct.

“Q. Now, then, are there any other items, referring to page two of Exhibit A, which your firm deals or would have supplied? A. No.

“Q. Now referring to page three of Exhibit A at which you are looking, are there any items on page three that your firm deals in or would have supplied? A. The last three items.

“Q. That would be Firzite and Pabco?

“A. Exterior gloss paint. [299]

“Q. Are you familiar with the prices and values of those items in June of 1956? A. Yes.

“Q. And what would be the value of the Firzite at that time?

“A. Oh, it’s about correct what they have there.

“Q. What is that value?

“A. Two dollars and fifty cents.

“Q. The Pabco white, five-one-o-one exterior gloss, what would be the value or price of that item in June of ’56?

“A. That would be two dollars.

(Deposition of Paul Henning.)

"Q. That's for the unit, a quart?

"A. Per quart, per item, per each.

"Q. Per quart. No other items on page three that your firm supplies? A. No.

"Q. Now then refer to page four of the exhibit. Are there any items that your firm deals in or would have supplied on that page?

"A. That is, I think all of this is ours.

"Q. Well, when you say 'all of this' would you start with the first item on that page reading from the top which your firm deals in or would have supplied?

"A. Well, the first item is shellac. [300]

"Q. What would be the value of that shellac in June of 1956?

"A. That shellac would be valued at five dollars per gallon.

"Q. You're referring to the next item that you would have supplied or which you deal in?

"A. Durham's Water Putty at sixty cents a pound which is about right. And the next item is six quarts of Texalite Paste Speckling putty at one dollar which would be correct. Six quarts of Texalite Sheet Rock sealer at a dollar which would be correct. Two pints of Weldwood Presto-set Glue at fifty cents is all right. Four one and a quarter pounds of Seal Rite Calking Compound at sixty cents which would be correct. One Calk and Tube, that's undoubtedly a set, a gun and a calking tube at six sixty, that would be all right. One Tile Fix at twenty cents, that would be right. Two

(Deposition of Paul Henning.)

Seal Rite Caulking Guns, tube, at six sixty which would be right for the heavy gun. Four guns at two dollars which would be all right, that would be correct. Six Putty knives at thirty cents, that would be correct. Two Number Six thousand three X brushes at two dollars. I am not familiar with that number of brush, but two dollars, if it was a four inch brush, that would be correct, and the next item is a scraper at ninety cents, would be all [301] right. Three scrapers again at forty cents would be all right. Five one inch scrapers at sixty cents is all right. Two paste spreaders, eight inch paste spreaders at sixty cents is all right. Four pounds of Durbens Water Putty, two dollars is right. One Yale lock and keys at fifty five cents would be all right. One wire brush, fifty cents is all right. One Chrome recess soap and grab at two dollars is all right. One spreader trowl at fifty cents, I don't know what type that is, but that sounds all right. One bag of perfatape at one dollar, that's probably worth about two and a half there. Two six by eighteen screens foundation vents at one dollar, that could be right. Twelve paint brush cleaners at ten cents is all right. Four one-half inch Schlage lock sets, AL-2, six eighty, that would be all right. That would be all right if it was a key lock, it doesn't say, but I imagine it is. One door latch set with knobs, two sixty is about right. One front door lock, twelve fifty, would be correct. One set of four inch half surface Butts-Stanley at fifty cents is all right. Four dozen pack-

(Deposition of Paul Henning.)

ages of Butts, fifty cents, it doesn't say what size, but if they were the standard door butts it would be correct. Five dozen packs of dull brass butts at fifty cents is all right. Four cans of Kerpo spray paint, eighty cents is right. One set of three inch [302] half surface butts at fifty cents is right. Four sets of door locks at three sixty, it doesn't say what type, but that's an average price.

"Mr. Hilger: What is an average price?

"A. Three sixty per lock. Eleven quarts of glass frosting at twenty cents is correct. One pint of Shellacol at forty cents is correct; one eight ounce weldwood glue at sixty cents is correct. One quart of putty at sixty cents is all right. Three one and three-quarter ounce Miracle adhesive at twenty cents. Nineteen half-pint Seal-Rite Glazing Compound at twenty cents is right. Two half-pints of Seal Rite putty at twenty cents is all right. The next item is a Fuller item which didn't come from us. Three gallons of Pabco Raintite fibre roof coating at one dollar is correct. Four pair of McKinney hinges at sixty cents is correct. Five drawer knobs at twenty cents is correct. Five pair of hinges at eighty cents is all right. Five pair of knobs at twenty cents is all right. Two pair of hinges at eighty cents is all right. Six pair of hinges at eighty cents is all right. Six cabinet latches at forty cents, that's correct. Six pair of cabinet latches at forty is right. Two pair of drawer pulls, twenty cents is right. Six pair of strap hinges, eighty cents is all right. Six pair of

(Deposition of Paul Henning.)

strap hinges at eighty cents is all right. [303]  
Six pair of strap hinges at eighty cents is right.  
Six pair of strap hinges at eighty cents is right.  
Three pints of Jasco Paint Remover at seventy-five is correct. One gallon of Super Kem-Tone wall paint at three sixty is correct. One gallon of Pabco seven seven two tint base satin enamel is correct. One pint of Pabco base at a dollar ten is correct.

“Q. Those are all items on page four supplied or handled by your firm?           A. Correct.

“Q. Now referring to page five, would you likewise run down that page and tell us what items you would deal in or supply and what the reasonable value is and price thereof would be on June of 1956?

“A. Right. The first one, a quart of Pabco tint base house paint at a dollar ten is all right. One quart of the same at a dollar ten is right. One gallon of exterior gloss white at five ten would be correct. The next item isn't ours. The next one is one set of Schlage lock set at four twenty which is approximately right. One roll of Pabco wall. I don't know what they have it priced here, a roll of Pabco wall is about forty dollars which is what they have extended, one and a third rolls of the same thing they have ten dollars which should be probably around sixty dollars for one and a third rolls. [304]

“Mr. Castro: Well, isn't it one-third roll?

“A. Is it one-third of a roll? That would be correct if that is what it is, yes. Two brooms,

(Deposition of Paul Henning.)

those aren't ours. Twelve bundles Pabco thick tab shingles, those are worth eight dollars and fifty cents for three bundles, eight dollars and fifty cents, that would be approximately right.

"Mr. Hilger: What would be approximately right?

"A. Thirty three dollars. One roll of Pabco black roofing at three twenty is correct. One pull—one drawer pull display board at two sixty, that should be around twelve dollars.

"Q. What is it now?

"A. It's a drawer pull display board.

"Q. What's it listed there?

"A. Two sixty.

"Q. What should it be?

"A. It should be around twelve to fifteen dollars. I am not sure which one it was, but they're all in the same price range.

"Q. I see. Go on.

"A. One hinge and latch display board at seven sixty. That would be correct. Two hundred and fifty foundation bolts at fifteen cents would be correct. Two spools of foundation wire at two dollars, that item [305] there is around nine dollars per roll.

"Q. What is it listed there at?

"A. It's listed at two dollars, it should be around seventeen dollars, I'd say, for the two rolls.

"Q. Instead of what?

"A. Instead of two dollars which they have.

"Q. All right. Go on.

(Deposition of Paul Henning.)

"A. One padlock, Yale. I believe that says fifty five dollars. That wouldn't be one Yale padlock. I don't know what that would be. If it was a Yale padlock it would probably be around one dollar.

"Q. All right. Go on.

"A. Two sets of planer heads. Those aren't ours. The next item copper tubing is not ours. Three kegs of wire nails, approximately four hundred pounds, sixty four dollars, that would be correct. Four lock sets on display at four sixty, that would be correct. Twenty one gallons of Pabco roof coating at a dollar ten would be approximately right. The next item, the Porter Cable saw is not ours. The Firestone wheelbarrow tires and wheels aren't ours. Six four by eight sheets of masonite damaged, well, when we sold it it wasn't damaged.

"Mr. Castro: How do you know it's the same masonite?

"A. Well, not being damaged, I wouldn't know.

"Mr. Hilger: What would be the value of the [306] undamaged masonite?

"A. Undamaged masonite would be approximately two dollars per sheet.

"Q. And what is it?

"A. They have five dollars per sheet or thirty dollars. That possibly wouldn't be ours. It may be tile board or something of that sort, I am not sure. The next item is window casings, aren't ours; seventeen cans of lap cement at twenty cents

(Deposition of Paul Henning.)

is correct. Eight gallons of hydroseal at six dollars would be correct. The next item is not ours. The next one is not. The next one, no. The next one, no. Here's four and a half boxes of linoleum tile, fifty four dollars, that would be correct. Two gallons of Kem-tone at three sixty is correct. One gallon of Kem-glo at four sixty would be correct. One rubber tired wheelbarrow at fifteen dollars would be correct. Seventeen pint cans—no, seventeen bundles of burned Pabco shingles at forty nine fifty. Again, that's six times four, that would be correct. One five-foot step ladder at two fifty, that's correct. Two bags of joint cement at two fifty, that would be all right, two fifty per bag, those are worth five dollars. They have them down as two fifty for both bags.

“Q. Now then those are all of the items on page four [307] of the exhibit, rather, on page five of the exhibit, of Exhibit A that your firm might have supplied or deals in? A. That's correct.

“Q. Now then referring to the page following five which is unnumbered and which is marked exhibit B attached to Exhibit A, was there any of the items on there in which your firm deals or which you would have supplied?

“A. Yes, the plywood, we would supply that.

“Q. What would be the value of the plywood shown on Exhibit B, the fair market value on June 26th, 1956?

“A. Well, they have it at fifteen cents per square foot. It varies according to the thickness

(Deposition of Paul Henning.)

of the plywood. That would be approximately the price of half inch plywood.

“Q. What would be the price of quarter and three-eighths and five-eighths and seven-eighths and so forth?

“A. I would say it varied from a quarter inch which would run nine cents per square foot to three-quarter inch which would run twenty two cents per square foot. The next item of roofing material, asphaltic, two hundred squares, that would be thick tab shingles at eight twenty which would be a fair price there.

“Q. That’s eight dollars and twenty cents per square?

“A. Per square, correct. And that’s all on that page.

“Q. Now in response to our request you have produced [308] here invoices covering the recorded sales to Eureka Lumber Company by Rice Supply for the first six months of 1956?

“A. That’s correct.”

Mr. Castro: May I read a few lines of the cross examination?

The Court: Very well.

“By Mr. Castro:

“Q. At the time of the fire, June 25th, 1956, was there an outstanding balance between Eureka Lumber Company and Rice Supply?”

Mr. Hilger: I object to that as incompetent, irrelevant and immaterial.

The Court: I do not think it is particularly

(Deposition of Paul Henning.)

material. I do not see that it does any harm. I will overrule the objection.

"The Witness: The balance that they owed us?

"Q. Yes. A. After June?

"Q. On June 25th, 1956?

"A. On June 25th approximately thirteen hundred dollars.

"Q. Did you visit the premises after the fire?

"A. Yes, I did.

"Q. And did you pick up any material there after the [309] fire? A. No, sir.

"Q. Did you have any material picked up there after the fire? A. No, sir.

"Q. Were twelve doors picked up by the Rice Supply Company after the fire?

"A. That was picked up by me, personally.

"Q. Well, then you picked something up?

"A. That was myself, yes, not the company.

"Q. And did you pay for the doors?

"A. No, I did not.

"Q. What did you do with the doors?

"A. I used them in my house, my personal house.

"Q. Is it a home that you were building?

"A. Yes.

"Q. Did you have to do anything to the doors in order to use them at your home?

"A. Yes, I had to sand them down, they were burned.

"Q. Did you do anything else with them?

"A. No, sir.

(Deposition of Paul Henning.)

“Q. Did you remove anything else from there?

“A. At the same time there was twelve jambs, doorjambs.

“Q. And did you use those? [310]

“A. Yes.

“Q. Did you pay for them? A. No, sir.

“Q. Is there anything else that you removed?

“A. No, that's all.

“Q. Did you sell any reject plywood to Eureka Lumber Company?

“A. At any time, you mean?

“Q. Yes. A. Yes, uh huh.

“Q. How much reject plywood did you sell to Eureka Lumber Company?

“A. Oh, I wouldn't be able to answer that without checking through the records.”

Mr. Castro: Page 18.

Mr. Hilger: Would counsel object to the reading of Page 17?

Mr. Castro: This is continuity that goes with what I had.

“Q. Did you have permission from somebody to remove those items?

“A. Yes, from Mr. Jensen.

“Q. Which Mr. Jensen? A. H. M.”

Mr. Hilger: I would like to read portions of [311] Page 17 of the cross examination beginning at line 6 on Page 17:

(Mr. Hilger reading.)

“Q. Do you know whether these items you have

(Deposition of Paul Henning.)

referred to in the proof of loss as to whether those items were involved in the fire of June 25th, 1956?

"A. I missed the first part of that.

"Q. Do you know whether the items that you referred to in the proof of loss were involved in the fire of June, 1956?

"A. Do I know that they were?

"Q. Yes.

"A. There was some of them after I visited the fire that you could see there had been burned like the shingles and the paint and what not in there.

"Q. The shingles hadn't been burned?

"A. Yes.

"Q. Hadn't been burned?

"A. They had been burned, yes.

"Q. The paint was burned?

"A. The paint was burned, uh huh.

"Q. Any other items you saw there?

"A. Oh, practically everything I saw was burned.

"Q. Well, do you know whether each of those items you referred to in your direct testimony were on the property at the time of the fire? [312]

"A. I would say most of them were, yes.

"Q. Did you see them there?

"A. Yes, uh huh."

Mr. Hilger: I would like to read into evidence at this time the deposition of Haley J. Bertain, likewise taken in Eureka, California, on September 19, 1957.

**"HALEY J. BERTAIN**

"a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

**"Direct Examination**

"Q. (By Mr. Hilger): Would you state your name, please?      A. Haley J. Bertain.

"Q. Where do you reside, Mr. Bertain?

"A. 1963 Myrtle Avenue in Eureka.

"Q. What is your business or occupation?

"A. Douglas fir sales manager for Simpson Redwood Company.

"Q. Where do you have your office?

"A. At Second and M Street in Eureka.

"Q. Did you formerly work for a company that was purchased by Simpson Redwood Lumber Company?

"A. Yes, I did. I worked for Eureka Redwood Lumber Company, and that was purchased by Simpson Redwood Company last August. [313]

"Q. It would be August of 1956?

"A. August, 1956.

"Q. How long had you been with the Eureka Redwood Lumber Company?

"A. Since it originated. Actually, I was at the plant, you see, since 1945. This plant that is in question now originally was Dolbeer and Carson and then was Pacific Lumber Company and then—I have worked at the same plant since 19—I think it was 1946 at the Dolbeer and Carson plant and it was purchased by the Pacific Lumber Company in 1951 and then purchased by M & M in 1952,

(Deposition of Haley J. Bertain.)

if my memory is correct, and known at that time as the Eureka Redwood Company, and then, of course, it's now owned and operated by Simpson Redwood Company.

“Q. Since Simpson took over the operation of your main production out of your plant there where you have been working, is it Douglas fir or redwood?

“A. Up until Simpson purchased the plant we were one hundred per cent redwood operation at which time I was the plant manager and Simpson converted us to a Douglas fir operation, one hundred per cent Douglas fir at the present time.

“Q. In connection with your work have you had occasion to know the Eureka Lumber Company and Hyrum [314] Jensen?

“A. Yes, I know Mr. Jensen personally and we have done business directly through me in purchases for his company.

“Q. Would that cover the period through 1954, '5 and '6?      A. Yes, sir.

“Q. In your capacity and occupation in the lumber business are you familiar with what type of stock would be suitable for the manufacture of molding?      A. Yes, I am.

“Q. Did you sell or did your company sell such type stock to Hyrum Jensen or the Eureka Lumber Company during the period that you have mentioned?

“A. Yes, we did.

(Deposition of Haley J. Bertain.)

“Q. Have you any records or other data concerning those sales, Mr. Bertain?

“A. We have records that I could—that I located in our files, sales that we had made to them through August, 1955, through September, 1956, the total sales at that time.

“Mr. Castro: Just a moment. May I see what you have there? May I see what you have?

“A. Uh huh.

“Mr. Hilger: Do you have the records themselves or [315] a summary of the purchase data that you have taken from them?

“A. We have the records on file, the invoices, of these particular sales here.

“Q. You have made a summary of those?

“A. This is a summary here of what is on the files.

“Mr. Castro: May I ask him a question or two? You prepared that record that you have just handed me?

“A. Yes.

“Q. When did you prepare it?

“A. It was prepared from our records in San Francisco.

“Q. When?

“A. Phoned to me this morning.

“Q. When? A. This morning.

“Mr. Castro: Same objection, Counsel.

“Mr. Hilger: You do not have your invoices in the Eureka office?

“A. No. These—the invoices that are pertain-

(Deposition of Haley J. Bertain.)

ing to this summary here, they're in our files, in our San Francisco sales office.

“Q. Now then this memorandum that we have here, the first date shown upon it relating to any item whatever it may be is August the 6th, 1955. Did your company [316] make any sales to the Eureka Lumber Company of stock suitable for manufacture into molding prior to August 6th, 1955?

“A. Yes. Those records are not easily available because they were cash sales prior to these particular——

“Q. (Int'g.) Have you made an effort to locate those records in the files of your company?

“A. Yes, we have. However, the company has been broken up and we are having a little difficulty reaching the records at the present time due to the peculiar way that—I am not too familiar with the maintaining of cash sales records.

“Q. Were you able to locate those records after your search, in the course of your search?

“Mr. Castro: Those are records prior to August of '55 you are asking about?

“Mr. Hilger: Yes.

“The Witness: Yes.

“Mr. Hilger: Have you been able to locate those records, Mr. Bertain?

“A. Up to this point, no.

“Q. Do you have any personal recollection of the transactions prior to August the 6th, 1955, with the Eureka Lumber Company?      A. Yes. [317]

(Deposition of Haley J. Bertain.)

“Q. Prior to that date did you sell any stock to them suitable for manufacturing into moldings?

“A. Yes.

“Q. Do you recall the approximate amount or footage of such sales?

“Mr. Castro: Prior to what date?

“Mr. Hilger: Prior to August 6th, 1955.

“The Witness: I could only from my recollection, I would say that it would be a minimum amount of fifty thousand feet of kiln-dried molding type stock, that's what we call molding stock, stock that could be remanufactured for molding items.

“Q. Now, then, you have referred to the face that prior to August 6th, 1955, your records would reveal sales of this type of material and other items to the Eureka Lumber Company, is that correct?

“A. Yes, they should.

“Q. Did they continue to buy for cash after August the 6th, 1955?

“A. To the best of my knowledge, they did not buy for cash after August of '55.

“Q. In what manner did they make their purchases?

“A. Through a wholesaler by the name of Hill & Morton.

“Q. I see. Now do you have a recollection of the [318] amount of materials that they purchased in that manner after August, 1955 and up to June of 1956?

“A. Yes, that's what this summary would be.

“Q. Do you have a recollection of that footage?

(Deposition of Haley J. Bertain.)

“A. Unfortunately, I don’t. I would have to look at this sheet at the present time.

“Q. Well, you prepared that sheet this morning, I think you stated.

“A. I took the memo and I read it off, but I can’t visualize it in my mind right now, unfortunately.

“Q. Would the use of that memorandum which you have prepared refresh your recollection of transactions since August the 6th of 1955?

“A. Oh, yes. Unfortunately I have prepared many other reports.

“Q. And what transactions or what footage, I am sorry, what footage of material suitable for remanufacturing into molding was sold by your firm, the Eureka Lumber Company—by your firm to the Eureka Lumber Company after August the 6th, 1955, and before June the 25th, ’56? Does the use of this memorandum refresh your recollection of the transactions with the Eureka Lumber Company during the period covered in the memorandum? A. Yes, they do. [319]

“Q. All right. Now what is your recollection then, Mr. Bertain, of the sales made by your firm to the Eureka Lumber Company of molding type stock during the period August of ’55 to June 25th of 1956?

“A. Well, on the basis of the summary here twenty thousand feet of the factory cuts as described here are items that would be used for remanufacturing and reworking into molding items.

(Deposition of Haley J. Bertain.)

That would be the logical thing to do with them in a remanufacturing plant.

“Q. Does that include the last item?

“A. That doesn’t include the last item because even though my recollection would be that—without this summary—that there would have been more footage than that purchased, the last item, of course, doesn’t come within the dates here that you mentioned.

“Q. What is the date of that last item?

“A. The last item on this summary reads nine—September 13th, 1955, but in my recollection at the present I believe that should have been September of ’56, so I really think it’s an error in typing.

“Q. Your best recollection, then, is that it would be during this period of eight six fifty five to June 25th, ’56, then would be in the neighborhood of twenty thousand?

“A. I would say a minimum of twenty thousand. My [320] recollection, as I mentioned before, I would say this is a minimum amount, as I was under the impression without this summary that there was possibly more than this purchased. However, this—I’ll have to use this as a basis. My recollection could be due to the periods involved, the larger volume, according to my recollection of that type of material, could have been purchased just prior to this record that we have here. I know that it was, I can’t say what period it was. In my mind it is—see, because the story in our dealings basically with the Eureka Lumber Company—

(Deposition of Haley J. Bertain.)

“Mr. Castro: (Int’g.) Been no question asked of the witness.

“Mr. Hilger: Mr. Bertain, in the course of your experience in the redwood industry prior to and up to June of 1956, did you become familiar with the market values of redwood lumber and redwood products in the Humboldt area?

“A. Yes.

“Q. And on June—in June of 1956 what would be the fair market value of redwood moldings and window casings in the Humboldt area?

“A. Well, of course, there’s a wide range of molding values even now, and in terms of per thousand board measure I would believe that the lowest molding items [321] would start from two hundred dollars and go up to as high as four hundred dollars per thousand board measure.

“Q. Would an evaluation of redwood molding and window casings at two hundred and twenty dollars per thousand board feet, board measure, be a reasonable evaluation in June of 1956 in Humboldt County?

“A. To the best of my knowledge and ability, it would be very conservative.

“Mr. Hilger: That’s all.

“Cross Examination

“Q. (By Mr. Castro): When were you first contacted to be a witness here, Mr. Bertain?”

Mr. Hilger: We will stand upon the objection.

The Court: I will allow it.

(Deposition of Haley J. Bertain.)

“The Witness: I’ll have to say about two weeks. I am just not sure of the date.

“Q. How were you contacted, in writing or orally?      A. Orally.

“Q. And who contacted you?

“A. Mr. Hilger.

“Q. And were you requested to bring with you any invoices?

“A. Yes, if I had them available I was asked to.

“Q. And did you make a request of your employer to produce the invoices? [322]

“A. I asked for the information that I have here now, yes.

“Q. When did you ask for that information?

“A. I asked for that about—well, the day after Mr. Hilger asked me if I could provide him with this type of information.

“Q. And when did you receive this?

“A. I received it over the telephone this morning from our San Francisco office. The delay was due to our accounting procedure as this wasn’t under Eureka Lumber Company’s name, it was under the name of a wholesaler. That caused some delay, you know, in arriving—and finding it.

“Q. Whose name?

“A. These sales were invoiced by our company to Hill & Morton Lumber Company.

“Q. You haven’t seen those invoices?

“A. I haven’t seen these. I probably prepared a number of them myself at the time.

“Q. What does the phrase ‘factory cuts’ mean?

(Deposition of Haley J. Bertain.)

“A. It’s a reject kiln-dried upper grade due to mismanufacture or characteristics that would not allow it to be graded into the regular standard specifications, set aside for the purpose of remanufacturing and are sold at a lower value than other associated grades. [323]

“Q. Then this lumber had been rejected by your company, the Eureka Redwood Company?

“A. Yes.

“Q. Now do you know whether this lumber that is listed, this twenty thousand feet that you referred to, whether that was at the Eureka Lumber Company at the time of the fire in June 25th, 1956?

“A. I can only assume.

“Q. Were you there?

“A. That it was.

“Q. Do you know?

“A. It was shipped to them prior to their fire. I don’t know by knowledge that it was actually there, no.

“Q. You don’t know what portion of it had been sold?

“A. I have no knowledge as to what could have been sold of it prior to the fire, no.

“Q. What was the charge per thousand when you sold this lumber?

“A. To the best of my recollection the majority of it was sold at twenty dollars per thousand.

“Q. Twenty dollars per thousand. And is that the going price for these rejects?

(Deposition of Haley J. Bertain.)

"A. As far as we were concerned, it was at the time, yes.

"Q. Now when you gave the price of two hundred to [324] four hundred dollars per thousand board feet on redwood moldings were you thinking of rejects? A. No, finished moldings.

"Q. Apparently there is quite a difference between the rejects and the finished piece of molding?

"A. There is. The rejects to us were of no value because we were incapable of manufacturing them in our operation, and we had not the facility nor the time and labor to remanufacture that particular type of stock.

"Q. Do you know whether any of these rejects were manufactured by the Eureka Lumber Company?

"A. I have no way of knowing for sure whether they were all remanufactured by them. I know that some were and I——

"Q. (Int'g.) When were you there the last time before the fire?

"A. I can't recall ever being inside their plant.

"Q. Did you ever see any of this reject lumber that you sold there in a manufactured state?

"A. No.

*"Redirect Examination*

"Q. (By Mr. Hilger): You have referred to the fact that the items covered in this memorandum were invoiced to Hill & Morton. Do you know whether the stock called for reflected on it—on

(Deposition of Haley J. Bertain.)

them was delivered, or to whom, [325] I should say?

“A. It was consigned from our plant in the case of kiln-dried factory cuts or factory remanufacture stock to their plant in Eureka.

“Q. The Eureka Lumber Company?

“A. The Eureka Lumber Company’s plant, their own operation. The items that I didn’t refer to there as being remanufacture stock was delivered directly to customers, their customers from our plant.

“Mr. Castro: Whose customers?

“The Witness: The Eureka Lumber Company’s customers.

“Mr. Hilger: That would not apply to the factory remanufacture stock?

“A. No, the remanufacture stock was consigned from our plant to their plant.

“Q. When you say ‘their plant’ you mean Eureka Lumber Company plant?

“A. I mean the Eureka Lumber Company, yes.”

Mr. Castro: I believe that is all I had, your Honor.

Mr. Hilger: I would like to complete the redirect examination, your Honor, beginning at page 15, line 7:

“Q. (By Mr. Hilger): Now it has been referred to here that this stock is reject stock. What is the reason for its reject, dimensions or poor quality of lumber involved? [326]

“A. Reject was used in describing it as not fit-

(Deposition of Haley J. Bertain.)

ting the standard grade segregation that we have available to offer from our plant. It did not apply itself to any standard item that we produced.

“Q. Was that because of the sizes or because of the dimensions?      “A. The reason——

“Q. (Int’g.) I am sorry, sizes and dimensions are two similar words, was it because of the size and dimension or because of the quality of the lumber contained in the piece?

“A. It would be due to both causes in cases of mismanufacture due to error or due to scantness of stock and skipping and not finishing up to the standards of standard grades or due to characteristics such as knots or splits or other defects in lumber that make it unsuitable for high class finishing in its original dimensions. It would be instead of—in our case, like I mentioned, not able to remanufacture it due to the high cost and lack of facilities at our plant, and this type of stock is all thrown in a pile and called reject because it doesn’t fit into a standard item at that time.

“Q. When remanufactured into molding does that mean the molding is reject or low quality molding? [327]

“A. This reject stock that we are talking about now, we actually remanufacture some of it, but we were unable to remanufacture all of it and keep it cleaned up as fast as it developed, and that’s why Mr. Jensen’s operation was used basically to sweep the floor and when we couldn’t keep up with it it was to our advantage to sell it to him at twenty

(Deposition of Haley J. Bertain.)

dollars, and, at times, I believe up to fifty dollars a thousand to move it out of our way.

“Q. Now we can get this question answered. Mr. Bertain, would the moldings that would be manufactured out of this material be standard quality moldings or would they necessarily be reject molding items?

“A. No, the moldings would be standard molding items.

“Mr. Castro: That depends on the manufacturer.

“The Witness: It depends on the manufacturer, certainly.

“Mr. Hilger: What I am getting at, Mr. Bertain, is the fact that you had rejected it for your purposes would not necessarily make it unsuitable for the manufacture of standard quality moldings?

“A. No, definitely not.

“Q. And is this the type of material that is ordinarily used for these moldings and other remanufacturing processes such as took place down at the Eureka Lumber Company? [328]

“A. Yes, it is normal stock used for moldings.

“Q. And for the production of standard quality moldings?

“A. For the production of standard quality moldings, yes.”

Mr. Castro: Mr. Hilger, this is the sheet we gave to Mr. Stearns at the time to pick up the other invoices. Do you object to the use of that?

Mr. Hilger: Absolutely there is an objection. I objected to it at the time and I object to it now.

Mr. Castro: Your Honor, I offer in evidence the sheet which the witness Bertain was reading from at the time of this deposition, designating what was factory cut and what was sent to other customers.

Mr. Hilger: There is no foundation for it.

Mr. Castro: The typewritten portion of that sheet is the portion which Mr. Bertain had. He gave it to Mr. Russell Stearns, an accountant, at the deposition, and Mr. Stearns had made those notations in pencil.

The Court: You can mark it for identification. Without some further foundation for it, it is not admissible. It does not appear who wrote what on here. There are changes in pencil.

Mr. Castro: I am offering it for the typewritten portions, Your Honor. [329]

The Court: There are certain of the typewritten portions that are changed. I think you have to lay a better foundation if you want it.

Mr. Castro: May it be marked for identification at this time?

The Court: It may be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit M for identification.)

Mr. Hilger: At this time we would read into evidence a portion of the deposition of Harold Dee Jensen, previously referred to herein, beginning at page 54, reading down through line 11 on page 55.

## HAROLD DEE JENSEN

called as a witness by the defendant and third party plaintiff, Boston Insurance Company, being first duly sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

“Q. (By Mr. Castro): The proof of loss that you are now looking at, Mr. Jensen, has a five-page inventory attached to it. (That is the same proof of loss that is now in by photostat copy as Plaintiff’s No. 5.) That was the inventory which you furnished to Mr. Hilger?

“A. I was just with Gene Cox—Gene Fox, it is—and he took the inventory and I just assisted him, [330] identifying some of the objects. He is the C.P.A. that took the inventory.

“Q. And did you discuss with him the prices which were placed on the items there in Exhibit A in that proof of loss?

“A. Yes. We got them out of price books and invoices.

“Q. Which is the proof of loss under Policy No. 560594. With reference to Exhibit B attached to that proof of loss, it refers to completely destroyed inventory, entirely consumed by fire. Did you determine that portion of the inventory?

“A. Yes.

“Q. And how did you make the determination of that inventory amounting to \$20,600?

“A. By previous inventories.

“Q. What previous inventories are those?

“A. One that I had taken for sales.

(Deposition of Harold Dee Jensen.)

“Q. Did you have those prior inventories in writing?

“A. To a certain extent. They were jotted down on scratch paper.

“Q. And where is that scratch paper?

“A. I don’t know, probably burned.

“Q. This Exhibit B was made up after the fire, wasn’t it?

“A. That’s right. This was taken from memory. I [331] had everything for sale, and I knew how much was there for sale at the time.

“Q. You carried that in your mind?

“A. That’s right.

“Q. Now, down with Exhibit C, Inventory on Damage by Fire, did you make a physical inventory of the lumber described in Exhibit C?

“A. That’s right.

“Q. How did you fix the prices which were used to reach \$30,000?

“A. Just a wholesale market price, cost.

“Q. That is cost to Eureka Lumber?

“A. That’s right.

Mr. Castro: I have nothing to read at this time, Your Honor.

The Court: Very well.

Mr. Hilger: At this time we will read into evidence the deposition of Dayton Murray, Jr., taken in Eureka, California, on September 7, 1957. [332]

“DAYTON MURRAY, JR.

“a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

“Direct Examination

“Q. (By Mr. Hilger): This deposition is taken pursuant to stipulation. Will you state your name, please?

“A. Dayton Murray, Jr.

“Q. And where do you reside?

“A. Eureka, California.

“Q. What’s your profession or occupation?

“A. I’m an Attorney at Law.

“Q. Do you hold any office in Dayton Murray Truck Sales?

“A. I am presently the Secretary of that Corporation.

“Q. In connection with your duties do you have custody of the records and documents of Dayton Murray Truck Sales? “A. I do.

“Q. Are you familiar, at least in a general way, with the transactions of the Dayton Murray Truck Sales? “A. I believe I am, yes.

“Q. Are you familiar in particular with a transaction with the Eureka Lumber Company involving a sawmill? “A. Yes, I am.

“Q. Do you have in your possession any [333] records pertaining to that transaction?

“Mrs. Ragon: Should that letter be on plain paper? Should it be on your letterhead?

“Mr. Hilger: Plain paper.

(Deposition of Dayton Murray, Jr.)

"The Witness: I have two documents that pertain to that transaction. I have a corporation copy of the invoice and I have a bill of sale.

"Mr. Hilger: These are a part of the regular business records of Dayton Murray Truck Sales?

"A. Yes, they are. They were in the file marked under the name of Eureka Lumber Company when I received the same.

"Q. Do you have any personal knowledge of the transaction at all, have you ever discussed it with the officials of the company?

"A. I have no direct knowledge of the transaction. I have knowledge of it from discussions with Mr. Harold Dee Jensen and with Mr. Threlkeld who was the previous Manager of Dayton Murray Truck Sales.

"Q. And those discussions concerning this transaction were in the course of conduct of business of Dayton Murray Truck Sales?

"A. Yes, that's correct.

"Q. Now just what was that transaction, Mr. Murray?"

Mr. Castro: The following objection, [334] Your Honor, we would ask for the Court to rule on.

The following appears in the deposition and was read silently by the Court:

"Mr. Castro: (Inter'g) Object to the question on the grounds the witness has stated he has no personal knowledge on the subject matter. He has testified he has possession of two documents, and any other information he has is purely hearsay.

(Deposition of Dayton Murray, Jr.)

“Mr. Hilger: As a result of the discussions that you have had in the course of the conduct of business of Dayton Murray Truck Sales, state your knowledge of this situation.

“Mr. Castro: Object to it as incompetent, irrelevant and immaterial, calling for hearsay. The witness has testified he has no personal knowledge of the transaction.

“Mr. Hilger: Please answer the question.

“The Witness: From the examination of the records of the Dayton Murray Truck Sales——

“Mr. Castro: (Int’g) The question didn’t call for an examination of the records of Dayton Murray Truck Sales, it called for your knowledge based upon your discussions had in the course and conduct of business of Dayton Murray Truck Sales.

“The Witness: My knowledge based on my discussions of the——

“Mr. Castro: (Int’g) Same objection to it, same objection that has been previously made, hearsay and the witness has stated he has no personal knowledge of the transaction.

“The Witness: May I answer the question, Counsel?

“Mr. Hilger: Yes.” [334a]

The Court: I will overrule the objection.

Mr. Hilger: Thank you, Your Honor. I believe the question is finally answered on page 9. May I begin the reading there:

“A. My discussions with Mr. Harold Dee Jensen

(Deposition of Dayton Murray, Jr.)

and with Mr. Threlkeld who was the then Manager of the Dayton Murray Truck Sales at the time of this transaction and from the documents of Dayton Murray Truck Sales, Dayton Murray Truck Sales sold a nine seventy-four series Diesel truck to the Eureka Lumber Company on January 1, 1956, at least, that's the date of the invoice. As a down payment to Dayton Murray Truck Sales they took a two seventy-five Cummings Diesel engine in a portable sawmill and credited four thousand dollars on the purchase price of the truck and agreed with Eureka Lumber Company to give them an additional thirty-five hundred dollar credit upon the sale of this resale by Dayton Murray Truck Sales of this sawmill unit or upon a certain date which is set forth in the invoice, whichever first occurred. I believe it was approximately six months after the date of the transaction.

"Mr. Hilger: Now you have testified that in your official capacity you have custody of the records and documents of the Dayton Murray Truck Sales? [335] "A. That's correct.

"Q. Mr. Murray, I hand you a car invoice form number 205 bearing the heading Dayton Murray Truck Sales, bearing date of January first, 1956. Did that document come from the regular records and books of the Dayton Murray Truck Sales?

"A. Yes, it did.

"Q. Was that prepared in the ordinary course of business? "A. Yes, it was.

(Deposition of Dayton Murray, Jr.)

“Q. And were the—in the ordinary course of business were those prepared at or about the time of the transaction they purport to reflect?

“A. Yes.

“Q. They form a part of the records of Dayton Murray Truck Sales that are in your custody, in your official custody with the Dayton Murray Truck Sales?

“A. Yes, that's correct.

“Q. Now, then, I direct your attention to certain figures upon that form. Looking at the right most column there is a column of figures. What is the significance of those figures?

“A. Well, the top most figure is the sales price of the unit sold to Eureka Lumber Company by Dayton Murray Truck Sales, and then there's other figures for sales [336] tax, license and financing costs, leaving you the total price and further down there's a credit given.

“Q. A credit against that purchase price?

“A. That's correct.

“Q. According to this document it would appear that there was sold to Eureka Lumber Company a piece of equipment. Those figures that you have just referred to, would that refer to the equipment that was sold to Eureka Lumber Company?

“A. That's correct.

“Q. And it shows a total price figure of fourteen thousand eight hundred and forty-six dollars. That would be the price of the piece of equipment bought by Eureka Lumber Company?

(Deposition of Dayton Murray, Jr.)

“A. That’s correct, it was a used truck and trailer.

“Q. Now, then, directly underneath the fourteen thousand odd dollars figure there appears a credit of four thousand dollars. What does that represent, Mr. Murray?

“Yes, Pardon me. I’ll lay a little foundation. You have knowledge of the record of Dayton Murray Truck Sales and what the entries upon those records reflect? “A. Yes, I do.

“Q. What does that figure, that four thousand dollar figure represent.” [337]

Mr. Castro: I stand on the objection made at that time.

The following appears in the deposition and was read silently by the Court:

“Mr. Castro: I object on the grounds it’s irrelevant, incompetent and immaterial. The witness has already testified and my examination shows that he has no personal knowledge concerning this transaction, and the document is the best evidence of what it states, and the original of the document would constitute the best evidence.” [337a]

The Court: It is taking an awful long time to prove a simple transaction, the purchase of a truck. I will overrule the objection.

Mr. Hilger: I think we can skip all the voir dire, then, and get down to the answer to the question, which begins on page 16, line 2:

“A. The four thousand dollar figure reflects a

(Deposition of Dayton Murray, Jr.)

credit on the purchase price given to Eureka Lumber Company by Dayton Murray Truck Sales on the trade-in of this portable sawmill described in the document.

“Q. Now in the ordinary course of conduct of Dayton Murray Truck Sales business where is the original invoice sent?

“A. The original invoice would have undoubtedly been sent to the purchaser.

“Q. Is the original of that invoice that you have there marked Defendant’s A for identification, is the original of that document in the records of the Dayton Murray Truck Sales?

“A. No, it is not.

“Q. I have reference now, Mr. Murray, to the notation appearing on Defendant’s A for identification ‘additional credit due June 12th, 1956, to be paid to YMAC on this [338] account in the amount of thirty-five hundred dollars.’ What is YMAC?”

Mr. Castro: I withdraw the objection.

“The Witness: YMAC is Yellow Manufacturing Acceptance Corporation which is the finance corporation for General Motors truck dealers. They finance the sales of equipment. Contracts are assigned to YMAC by the dealer making the contract. The significance of the notation here is that that represents the——

“Mr. Castro: (Int’g) Just a moment. He asked you what the initials stood for.

(Deposition of Dayton Murray, Jr.)

“Mr. Hilger: I’ll at this time ask you the significance of that notation.”

Mr. Castro: I withdraw the objection.

“Mr. Hilger: Would you answer that?”

“The Witness: The significance of the statement on the invoice is the thirty-five hundred dollars listed is additional credit due YMAC, represents the balance of the credit on the purchase price that was given for the trade-in of the portable saw-mill.

“Q. That would be the purchase price paid by Dayton Murray Truck Sales for the portable saw-mill? “A. That’s correct.

“Q. To Eureka Lumber Company?

“A. That’s correct. [339]

“Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollars item that you previously testified concerning?”

Mr. Castro: I stand on that objection.

The following appears in the deposition and was read silently by the Court:

“Mr. Castro: Objected to as incompetent, irrelevant, and immaterial, no identification as to who made that notation that you are referring to. It’s not part of the original document, that’s obvious.

“The Witness: YMAC is Yellow Manufacturing Acceptance Corporation which is the finance corporation for General Motors truck dealers. They finance the sales of equipment. Contracts are assigned to YMAC by the dealer making the contract. The

(Deposition of Dayton Murray, Jr.)

significance of the notation here is that that represents the——

“Mr. Castro: (Int’g) Just a moment. He asked you what the initials stood for.

“Mr. Hilger: I’ll at this time ask you the significance of that notation.

“Mr. Castro: Objected to as incompetent, irrelevant and immaterial, calling for an opinion and conclusion of the witness and not for a fact.

“Mr. Hilger: Would you answer that?

“The Witness: The significance of the statement on the invoice is the thirty-five hundred dollars listed is additional credit due YMAC, represents the balance of the credit on the purchase price that was given for the trade-in of the portable saw-mill.

“Q. That would be the purchase price paid by Dayton Murray Truck Sales for the portable saw-mill?       “A. That’s correct.

“Q. To Eureka Lumber Company?

“A. That’s correct.

“Q. And that thirty-five hundred dollars would be an—in addition to the four thousand dollar item that you previously testified concerning?

“Mr. Castro: Same objection.

“The Witness: That’s correct.

“Mr. Castro: Same objection to this line of questions, Counsel, he has no personal knowledge of the transaction.” [339a]

The Court: Overruled.

“Mr. Hilger: Then your answer is yes?

(Deposition of Dayton Murray, Jr.)

"The Witness: My answer is yes.

"Q. I'll show you now a bill of sale reflecting a transfer from Eureka Lumber Company to Dayton Murray Truck Sales of a portable sawmill. Is that document a part of the records of Dayton Murray Truck Sales in your official duties, in your official capacity with Dayton Murray Truck Sales?

"A. Yes, it is.

"Q. Did that document to which you're now referring, the bill of sale, come into your possession at the same time that Defendant's A for identification was given to you?

"A. Yes, it did.

"Q. That would have been in February or early March of 1956?

"A. That's correct.

"Q. Do you know whether or not that covers the same piece of equipment reflected on the notation on Defendant's Exhibit A, portable sawmill, two seventy-five [340] Cummings Diesel engine?

"A. I believe it does."

Mr. Hilger: At this time I will offer both the bill of sale and the invoice into evidence as Plaintiff's next in order.

The Court: There are documents that are attached here.

Mr. Hilger: Yes, Your Honor.

Mr. Castro: I object to the invoice on the ground it is not the best evidence of the transaction, Your Honor.

The Court: You are making an objection to the document?

(Deposition of Dayton Murray, Jr.)

Mr. Castro: Yes, the copy which was used of the invoice.

The Court: I will overrule the objection. You want them marked one exhibit?

Mr. Hilger: They may be marked as one exhibit.

(The bill of sale and the invoice were thereupon received in evidence and marked Plaintiff's Exhibit 20.)

Mr. Hilger: I think that is all the Plaintiff wishes to introduce from this deposition.

Mr. Castro: This is referring to page 12, line 18. Exhibit A is the invoice, I believe.

"Mr. Castro: When did you first see Exhibit A?

"A. Probably in the—I am speaking from memory only, in the latter part of February or the early part of March of 1956.

"Q. And where did you see it?

"A. In my office.

"Q. Where is your office located?

"A. 550 I Street, Eureka, California.

"Q. Is that the office of the Dayton Murray Truck Sales?

"A. No, it is not. It's the office of my firm, Huber and Goodwin.

"Q. That's where you practice as an attorney?

"A. That's correct.

"Q. As an attorney at law?

"A. That's correct, sir.

"Q. And did you receive that document in the

(Deposition of Dayton Murray, Jr.)

course of the mail or did someone deliver it to you personally, in person?

“A. My father, who is the President of Dayton Murray Truck Sales, delivered it to me with the additional other documents relating to the business of Dayton Murray Truck Sales.

“Q. What other documents do you have reference to?

“A. The entire corporate records of that corporation.

“Q. When did you become Secretary of the corporation? [342]

“A. I was originally Secretary and when the corporation was formed in 1950, I believe it was, and I became Secretary again about the same time I received these documents.

“Q. Was an interim between 1950 and February of 1956 when you were not a Secretary of the corporation?

“A. The interim period would run from September of 1953 at which time my father and myself sold our stock in the corporation until 1956, the date I have been referring to.

“Q. Can you be a little more specific as to the date?

“A. The best I can give you is the latter part of February or the early part of March of 1956.

“Q. And you had a certain portion of the capital stock of Dayton Murray Truck Sales up to September of 1953?      “A. That’s correct.

(Deposition of Dayton Murray, Jr.)

“Q. And your father had a certain portion of the capital stock of the corporation?

“A. That’s correct.

“Q. Were there any other stockholders?

“A. No, sir.

“Q. Then you disposed, you and your father both disposed of your capital stock in the corporation? “A. That’s correct. [343]

“Q. And to whom did you dispose of it?

“A. To Mr. W. A. Threlkeld, who I have previously referred to as then Manager of the Dayton Murray Truck Sales.

“Q. And thereafter did you have anything to do with the management of Dayton Murray Truck Sales?

“A. I would say no other than general advice from time to time.

“Q. By ‘general advice,’ are you referring to being employed as counsel from time to time?

“A. Yes, sir.

“Q. Or are you speaking of being a corporate officer?

“A. No, I was not a corporate officer from September of ’53 until February or March of ’56.

“Q. And on the date of Exhibit A you were not in any way connected with the Dayton Murray Truck Sales? “A. Not as an officer, no.

“Q. Were you employed by Dayton Murray Truck Sales as of January 1, 1956?

“A. Counsel, in answer to your question, you

(Deposition of Dayton Murray, Jr.)

say in any way connected, they owed me some money at the time, that's about the only connection I had.

"Q. You understand the term I am using connection as an employee of Dayton Murray Truck Sales?

"A. I am not an employee—I was not an [344] employee of Dayton Murray Truck Sales at the date of the invoice.

"Q. Do you know where the original of this invoice is, of Exhibit A is?

"A. It is probably in the files.

"Q. Do you know?

"A. No, I do not know of my own knowledge."

Then at page 23, line 20, of the cross-examination.

"Q. Do you have a ledger record which would reflect this transaction of the purchase of the GMC Utility truck and trailer with YMAC?

"A. I believe there would be a record with YMAC, but I think that the record of the transaction is contained in the invoice with a copy being sent to YMAC. In other words, the ledger record that you are referring to, if I am thinking about the same thing, would be a debit credit arrangement which usually is only kept regarding open accounts. Contracts are kept in separate files.

"Q. You don't have any ledger account set up with YMAC? "A. On this transaction?

"Q. On this transaction.

"A. Well, there's an account with YMAC on

(Deposition of Dayton Murray, Jr.)

the transaction, yes, and it will be reflected as reflected on the invoice.

“Q. And do you have possession or control of that [345] ledger record?

“A. I don’t believe I have that, no. Undoubtedly, YMAC has that record.

“Q. Where is YMAC located?

“A. It’s in Oakland, California for this district. Their main office is in Oakland, California, for this district.

“Q. Now do you know who’s had possession of this truck at the time of the fire of June, 1956?

“A. Eureka Lumber Company, the best of my knowledge.

“Q. And do you know who has possession of the truck at this time?

“A. I have no knowledge regarding that.

“Q. The invoice calls for certain payments to be made. Were those payments made?

“A. I don’t know.

“Q. Was Eureka Lumber Company delinquent in any of these payments at the time of the fire in June of 1956?

“A. I don’t know that either. At that time I was not connected with Dayton Murray Truck Sales or had anything to do with the operation.

“Q. But you do have a ledger account which would reflect the status of that account?

“A. That information could be obtained, yes, sir.

“Q. Could you obtain that ledger account [346] this morning?

(Deposition of Dayton Murray, Jr.)

“A. No, sir. I can explain that. The account is in my father’s place of business and he is out of town and will not return until tomorrow or Monday. I can’t get into the place.

“Q. Could you deliver a copy of that account to Mr. *Crnich*?

“A. Probably the first of the week I could.

“Q. Would you do that Tuesday or Wednesday or this coming week?

“A. You want any ledger account showing debits and credits between the Eureka Lumber Company and Dayton Murray Truck Sales?

“Q. That’s correct, with particular reference to this transaction if there’s a special account on it.

“A. I’ll deliver whatever we have in our possession on Tuesday.”

Mr. Castro: Is the ledger sheet in the original of the deposition that you have, Your Honor?

The Court: I handed all the papers attached to this deposition to the Clerk. You might look at it.

Mr. Castro: Yes, we would offer that in evidence as a defendant’s exhibit.

The Court: It has already been offered in evidence.

Mr. Hilger: I did not intend to offer any [347] ledger sheets into evidence, and I would like a moment to study it. I did not even know it was in the deposition.

The Court: There is a bill of sale and the invoice.

Mr. Hilger: I will object to that. Obviously on

its face it has nothing to do with the purchase and the sale of this piece of equipment. It is an open account, debits and credits, obviously for repair work done and credits given for payments thereon back and forth, showing the balance, but it has nothing to do with the terms of the invoice, and Mr. Murray's own testimony would be that the truck item would not appear in the ledger account but only in the open account.

The Court: Yes, there is a letter that accompanies it from the witness Murray. It says it is a balance due on open account.

Mr. Castro: May we ask that it be attached as an exhibit for identification?

The Court: So the record may be clear, Plaintiff's Exhibit 20 will be just the bill of sale and the invoice which is attached. Now, you want these other two documents, the copy of the ledger sheet and the letter of the witness to the Court Reporter marked for identification.

Mr. Castro: Yes, your Honor.

The Court: This will be Defendant's Exhibit N.

(The document referred to was thereupon marked Defendant's Exhibit N for identification.) [348]

Mr. Hilger: The Plaintiff rests, Your Honor.

The Court: This is an appropriate time for lunch then. We will reconvene at 2:00 o'clock, members of the jury. [349]

Thursday, September 26, 1957—2:00 o'clock P.M.

Mr. Castro: Ready for the defense. I would ask that Mr. Roberts be called.

Mr. Hilger: At this time, Your Honor, may I have an order excluding witnesses, not parties?

The Court: Have you got witnesses in the Court-room?

Mr. Castro: Yes, your Honor. They have not been excluded at anytime. They just came in now.

Mr. Hilger: They could not very well have been excluded prior.

The Court: Of course, we have been——

Mr. Castro: Proceeding without any such order.

The Court: You have some witnesses who are going to testify for the defense. I think counsel is within his rights to ask that witnesses be excluded before any witness on the same side testifies. We have a nice rest room outside for the witnesses. Who is your first witness?

Mr. Castro: Mr. John Roberts.

The Court: The other witnesses who are going to testify for the defense will please remain outside the Courtroom until their names are called.

### JOHN ROBERTS

was called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court and the Jury?

A. John Roberts.

### Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Roberts?

A. On Elk River in Eureka.

Q. How long have you made your home in the

(Testimony of John Roberts.)

Eureka Area?           A. Oh, four years.

Q. What is your general business?

A. Well, mostly in lumberyards.

Q. Have you followed that a good portion of your working life?

A. Well, I would say about 15 years.

Q. And you are appearing here under a subpoena which was served upon you to appear at the trial of this case?           A. Yes.

Q. Are you acquainted with Hyrum Jensen?

A. Yes.

Q. Were you acquainted with Harold Dee Jensen?           A. Yes.

Q. How long have you known either one of those gentlemen? [351]

A. Well, I would say from January in 1955 I got acquainted with them.

Q. Are you acquainted with the Eureka Lumber Company in the City of Eureka?           A. Yes.

Q. Did you become acquainted with Hyrum Jensen and Harold Dee Jensen with relation to the Eureka Lumber Company?           A. Yes.

Q. Were you employed at the Eureka Lumber Company?           A. Yes.

Q. In what capacity were you employed at the Eureka Lumber Company?

A. Yard foreman.

Q. When did you first go to work as yard foreman?

A. Well, I think I went to work about in March, possibly April, of 1955, and I think I worked prob-

(Testimony of John Roberts.)

ably a couple of months before I was made foreman.

Q. Then after you were made foreman how long did you serve as foreman at the Eureka Lumber Company?

A. Until, I think, about the first of June, 1956, I believe.

Q. Do you recall a fire which occurred at the Eureka Lumber Company on Monday, June 25, 1956?

A. Yes, but I was not there at the time.

Q. With relation to the date of that fire, can you tell [352] us approximately when was the last time that you worked?

A. I couldn't be sure, but it was, I think, in the neighborhood of ten days or possibly two weeks before the fire.

Q. I call your attention to the diagram which is on the blackboard here as Defendant's Exhibit A. The outline which I am tracing represents the ground plan of the Eureka Lumber Company Building at the corner of Commercial and Third Streets.

A. Yes.

Q. This to which I am pointing would be the Hayes Building, where the Hayes Second-Hand Store is, and Broadway would be to the left of the diagram. The railroad tracks are to the rear or top of the building, and we have referred to the shed or the open half of the building as being this particular area (indicating), and the room or office section of the building being the east half of the building.

(Testimony of John Roberts.)

The black lines represent walls, with the breaks in them representing doors or openings, and where there is a window it is marked "window."

Do you understand that diagram?

A. Yes, it is very plain.

Q. With reference to the shed, or the west half of that building, did your work take you into that shed? A. Occasionally, yes.

Q. Were you there at the time a James Ragsdale leased a portion of the shed and built the sawmill? [353] A. Yes.

Q. Was that sawmill under construction while you were foreman? A. Yes.

Q. You see marked, "Sawmill," at a point here, representing a portable sawmill along the east section of that shed. Are you acquainted with that?

A. Yes.

Q. That was there at the time you were there?

A. Yes.

Q. Do you recall the Ragsdale people coming in to do their construction work, the origin of it?

A. Yes, I was there when the whole thing was built.

Q. At the time Ragsdale came in was there any redwood molding stored along this west wall running from the area which is marked six to eight feet to the Third Street entrance?

A. There was a little lumber. Most of that was what you call drop siding.

Q. What do you mean by drop siding?

A. A board that is thin on one side, on one edge,

(Testimony of John Roberts.)

and thick on the other, and laps over when it is put on a house.

The Court: You did not fix the time, counsel. You said at the time Ragsdale came in.

Q. (By the Court): Can you tell us approximately when Ragsdale came in? [354]

A. I don't know how long he was in there——

Q. The question is, do you know when he came in, when he started?

A. Well, to the best of my knowledge he was in there about two months.

Q. When did he come in? When, if you know.

A. I couldn't say for sure.

Q. (By Mr. Castro): When you said two months, would that be—with reference to what period?

A. Well, that would be before I left, which was about the first of June or sometime in there. I am not sure.

Q. At the time Ragsdale came in was there any redwood molding taken from any place in the building and stacked on the portable sawmill, which was along the east side?

A. Not that I recall.

Q. During the time that you were employed up to the time that you left there was any redwood molding stacked along the west wall in the area to which I am pointing, marked "Redwood Molding Kiln-Dried"? A. Not while I was there.

Q. During the time that you were there was there any redwood molding, kiln-dried, stacked in

(Testimony of John Roberts.)

the area of this rectangle marked "X-5, X-4," and "X-3"?

A. There could have been some in there—a small amount. [355]

Q. Approximately how much?

A. Well, on a rough guess I would say 1,000 feet.

Mr. Hilger: I will object and move to strike any rough guessing.

Q. (By the Court): Do you know how much was there?

A. I didn't hear what you said.

Q. Do you know how much there was there?

A. No, I don't know, but I would say possibly 1,000 feet.

Mr. Hilger: I didn't hear that.

The Court: He said he did not know exactly, but he would say about a thousand feet.

Q. (By Mr. Castro): At the time you left your employment ten days to two weeks before this fire how much lumber would you say, in your opinion, was in that shed area?

A. Well, I would say there was 2,000 feet in the whole building.

Q. Would you describe the character of the lumber which was in that shed?

A. There was some one-by-six and one-by-eight back in the further corner, the upper further corner, that was fairly good lumber, but there wasn't much left there. It was mostly all sold out.

(Testimony of John Roberts.)

Q. Will you mark that area to which you have reference? [356]

A. Well, it laid somewhere in there (indicating). This would be the back door, I think.

Q. Yes, I think that represents a door.

A. Along in this area in here, in there.

Mr. Castro: May we mark that "1 x 6," and "1 x 8," your Honor?

Q. (By Mr. Castro): That is one foot by six foot? A. One inch by six inches.

Q. What was the character of that one-by-six and one-by-eight? Was that redwood molding?

A. No, that was what you might call fence lumber.

Q. What was the character of the other lumber that was in that shed area?

A. Well, there was all sorts of molding, as you would use around — some of it around windows, doors, maybe baseboards, and a lot of smaller stuff.

Q. Generally, where was that stuff located?

A. Well, to begin with, across through here was some, and down through this way was some, a little further down, a little further to the door, maybe (indicating). I don't know what this represents.

Q. The sawmill in there is indicates as being along there.

A. Down here, and reaches in to about there, I would say, [357] right close to the door, and there was some molding in here, and there was some across this way (indicating). In here was an old edger.

(Testimony of John Roberts.)

Mr. Castro: May we mark "Edger" where he has indicated an edger?

The Witness: The last time I was in there there was an edger. The sawmill was extending from this door back in through here (indicating).

Q. (By Mr. Castro): You are indicating the front door on Third Street. Is that the Ragsdale sawmill?

A. Yes, that is where it was built.

Q. How far did it extend into the shed?

A. Well, I don't know how long the building is, or how long the sawmill was, but there is quite a little room in back.

Q. During the time that you worked at the Eureka Lumber Company did you see a quantity of redwood fencing in the shed building which would total approximately 35,000 board feet?

A. No.

Q. Did you see in the shed during any of the time that you worked there vertical grain redwood molding of a volume of approximately 66,000 board feet?

A. No.

Q. And during the time that you worked there did you see [358] any activity carried on in the nature of remanufacturing reject molding? Do I make myself clear?

A. No.

Q. Was molding bought during the time that you worked there?

A. Not that I recall, no. This fence lumber we were talking about on this corner was bought after

(Testimony of John Roberts.)

I came. This molding was in there when I went in there.

Q. You are indicating this area which is in the nature of X-5, which I will mark "Molding," was there at the time you went to work? A. Yes.

Q. On the day of the fire were you working some place?

A. I was baling hay in the country.

Q. Was that in the area of Eureka?

A. Oh, I would say maybe six miles from Eureka.

Q. Did you learn about the fire?

A. I even heard the fire whistle at noon time.

Q. Later on in the day did you receive any message concerning Hyrum Jensen? A. Yes.

Q. After you received the message concerning Hyrum Jensen did you see Mr. Jensen that day?

A. I saw him that evening after dinner.

Q. Where did you see him? [359]

A. Down at the mill, at the yard.

Q. That is the Eureka Lumber Company yard?

A. Yes.

Q. Did you have a conversation with Mr. Hyrum Jensen? A. A short one, yes.

Q. Will you state who was present?

A. Just Mr. Jensen, my wife and I.

Q. Will you state what the conversation was?

A. He asked me how much lumber I thought burned up in the shed, and I told him I didn't think there was a thousand feet in there. He told me he

(Testimony of John Roberts.)

had put 20,000 feet, about 20,000 feet, in a few days before, or a short time before.

Q. Up to the time that you left there in the month of June had 20,000 feet been put in?

A. After I left.

Q. That is what he was referring to?

A. Yes.

Q. Was there anything else in that conversation?

A. Nothing of any importance. I talked about the fire being too bad, and a lot of destruction.

Mr. Castro: I have no further questions, your Honor.

#### Cross Examination

Q. (By Mr. Hilger): Mr. Roberts, you were not employed as a tallyman at [360] the Eureka Lumber Company? A. Tallyman? No.

Q. You never made any tallies of lumber?

A. Yes, lots of them.

Q. I mean at the Eureka Lumber Company, inside the shed?

A. I tallied lumber that I sold, yes.

Q. That was outside in the yard?

A. Well——

Q. Basically outside in the yard, was it not?

A. Yes.

Q. You did not concern yourself to any great degree with the business inside this building, did you?

A. The business was so small inside the building——

(Testimony of John Roberts.)

Q. (By the Court): That is not what he asked you. He didn't ask you how big the business was. He asked you whether you concerned yourself with the business inside the shed.

A. Well, I would say no.

Q. (By Mr. Hilger): After this fire you made a sworn claim for wages with the Labor Commission, did you not, against the Eureka Lumber Company, amounting to several hundred dollars, perhaps running into the thousands of dollars?

A. Not several hundred, no. I think it is around \$160.

Q. You are aware, of course, that the claim that was made [361] and presented to Mr. Jensen amounted to about \$1,260, aren't you?

Mr. Castro: We object to that. The claim would be the best evidence.

Mr. Hilger: I asked if he was aware of it.

The Court: It is proper cross examination; overruled. He is asking him if he is aware of something.

A. I asked them to collect my wages.

Q. (By Mr. Hilger): You are aware of the amount they went after when they went to collect those wages, aren't you?

A. The \$160, or whatever it was, close to that.

Q. You are aware that they made claim as a result of your claim upon Mr. Jensen for \$1,200 and some odd?

A. They said they would collect waiting—I think they called it waiting time.

(Testimony of John Roberts.)

Q. (By the Court): The question that he asked you was, did you know——

Who was it you said?

Mr. Hilger: The Division of Labor Enforcement.

Q. (By the Court): ——the Division of Labor Law Enforcement made a claim on your behalf in excess of \$1,200 against Mr. Jensen? A. No.

Q. You did not know that? [362]

A. No.

Q. (By Mr. Hilger): You did know they made a claim in the amount of several hundred dollars, didn't you?

A. They never did tell me any amount. They were going to collect for a waiting period for my June's wages, I think it is.

Q. And you are aware that that was disposed of for \$80.00 by the Division of Labor Law Enforcement? A. I didn't get that.

Q. You are aware that that was disposed of for \$80.00, weren't you? A. Disposed of?

Q. Yes.

The Court: Settled.

Mr. Hilger: No; I mean disposed of after hearing.

A. Not to my knowledge, no.

Q. (By Mr. Hilger): You did not show up at the hearing, did you?

A. There was no hearing that I knew anything about.

Q. Is that the same kind of testimony that you

(Testimony of John Roberts.)

made when you estimated the thousand feet of lumber in here, Mr. Roberts?

Mr. Castro: I object to that as argumentative, your Honor.

The Court: Sustained. [363]

Q. Do you know how big a pile a thousand feet of lumber is? A. I have a pretty good idea.

Q. Just how big is it?

A. Well, get your pile of lumber. I can check it, tally it, and tell you exactly.

Q. You just tell us now how big a pile a thousand feet of lumber is, Mr. Roberts.

A. Well, I would say probably most of ours there was about three feet wide, and the average length, we will say 16 feet in length, and possibly it would be close to 30 inches high.

Q. You are aware that an average unit of lumber contains about 2,000 board feet, aren't you?

A. You were not asking for that, you know.

Q. I asked you now. You are aware that an average unit of lumber contains 2,000 feet?

A. An average unit?

Q. The average unit is about three feet high, four feet wide, and about sixteen feet long, isn't it?

A. Well, close to that.

Q. A half of that would be a little old pile two feet high, three feet wide, and sixteen feet long, wouldn't it? That would contain a thousand feet?

Mr. Castro: I object to that, your Honor. It is a matter of mathematics.

Mr. Hilger: I am asking him if that is not true.

(Testimony of John Roberts.)

Q. (By Mr. Hilger): Yes or no.

A. How big did you say?

Q. Two feet high, three feet wide, and sixteen feet long.

A. Would be a thousand feet?

Q. That would be approximately right, wouldn't it? That is a half a unit?      A. No, it is not.

Q. How much is a half a unit?

A. Well, a unit is—well, we would say three feet wide. They run a little wider than that, usually.

Q. How much wider?      A. Oh,—

Q. How much wider?

A. Well, they are different widths, so far as that goes.

Q. Approximately how much wider on the average?

They have to be a certain size to be hauled to fit on a truck. You know that, don't you, Mr. Roberts?

A. Yes.

Q. How much wider than three feet?

A. I can't tell you exactly, but they are somewhere between three feet and three and a half feet.

Q. All right. I will settle for three and a half feet. Three and a half feet would be a thousand feet of lumber, wouldn't it?

A. About that, yes.

Q. And that is two-by-fours, where you are dealing in a board measure that is coming to one and three-quarter inches for the full two-inch measure. You are not counting a double-measure like you do

(Testimony of John Roberts.)

in molding—or do you know anything about double-measure in moldings?

A. Well, molding usually sells by the linear foot.

Q. Yes, but in board foot measure it would be double, wouldn't it?      A. Some of it.

Q. In the units we are talking about there are two-by-fours and two-by's dimension lumber, isn't that so, when we are talking about the cubic content of lumber of a thousand board feet?

A. Cubic content? You are talking about board feet?

Q. Let us talk about board feet. And the board feet we are talking about is made up of one and three-quarter inches, having a nominal two-inch thickness, give or take one-sixteenth of an inch?

A. If it is surfaced. If it is rough it would be more.

Q. Seven-eighths of the nominal two-inch thickness; and a thousand feet of molding that is on a half-inch basis would [366] be even a smaller pile, wouldn't it?      A. Yes, it would.

Q. You have a pile of lumber all over in this area (indicating). You have shown us some here, some down here. And you ask us to believe that is only a thousand board feet?

Mr. Castro: I object to that as argumentative, your Honor.

The Court: I think probably it is argumentative, counsel. Sustained.

Mr. Hilger: That is all.

The Court: Any further questions?

Mr. Castro: I have no questions. May the witness be excused, your Honor?

The Court: Very well.

(Witness excused.)

JOHN E. WILSON

called as a witness by the defendant, being first duly sworn, thereupon testified as follows:

Q. (By the Clerk): Will you state your name to the Court and Jury?

A. John E. Wilson.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Wilson? [367]

A. In Eureka.

Q. How long have you lived in the Eureka area?

A. Well, I have lived there two years and two months this last time.

Q. Did you live there prior to two years ago?

A. I first came to Eureka, or Arcata, 15 years ago.

Q. In general, what type of work have you followed? A. Sawmill work, and woods work.

Q. You are a married man with a family?

A. Yes, I am.

Q. Are you acquainted with Hyrum Jensen?

A. Yes.

Q. Are you acquainted with Harold Dee Jensen? A. Yes.

Q. Are you acquainted with the Eureka Lumber Company in the City of Eureka? A. Yes.

(Testimony of John E. Wilson.)

Q. Did you ever go to work at the Eureka Lumber Company?      A. Yes.

Q. About when did you go to work at the Eureka Lumber Company?

A. It was the latter part of March a year ago, I believe.

Q. March of 1956?      A. Yes.

Q. What type of work did you do at the Eureka Lumber [368] Company?

A. Well, just general work, whatever there was to do.

Q. The diagram on the wall to your left, Exhibit A, represents the floor plan of the Eureka Lumber Company Building, and this line represents the partition between what we have been calling the shed and the office or the room section of the building, and the open air storage for lumber would be to the left of that diagram. The black lines represent the walls and the openings represent the doorways. A portable sawmill, which was located in the east half of the shed, is indicated between these lines that I am pointing to. Third Street in front, Commercial Street is here, a second-hand store is on that corner, the railroad tracks are at the top (indicating).

Do you think you understand that diagram?

A. Yes, I do.

Q. Did you have any work that took you into the shed of that building?

A. I never did work in the shed, no.

(Testimony of John E. Wilson.)

Q. Did you have work which took you in the shed of the building?

A. I was in the shed a few times. Sometimes we parked the lumber stacker there at night.

Q. What is a lumber stacker?

A. Well, it is a machine that they use to pick up and load lumber, and stack it. [369]

Q. Where did you park the lumber stacker?

A. Just inside the back door from the railroad.

Q. Could you indicate where that lumber stacker was parked?

A. Well, we always parked them right at the back door, right there (indicating).

Mr. Castro: May we mark that "Stacker"?

The Witness: In rainy weather we parked them there. If it looked like it was going to be clear, it was left outside.

Q. (By Mr. Castro): Do you remember a saw-mill being built in the shed area by a man by the name of James Ragsdale? A. Yes, I do.

Q. Were you working during the period of the construction of that sawmill? A. Yes.

Q. As part of your duties did you drive truck?

A. Yes, I did, some.

Q. Did you make deliveries of lumber and other merchandise from the Eureka Lumber Company to people who were buying it?

A. A few times, yes.

Q. Were you working on the day before the fire at the Eureka Lumber Company, on June 25, 1956?

A. No, I was not.

(Testimony of John E. Wilson.)

Q. Had you reported to go to work that morning?      A. Yes.

Q. Was anybody taken on to work on the morning of the fire?      A. Nobody that I knew of.

Q. When was the last time prior to the day of the fire that you were at the plant?

A. I think it was on Saturday. We sorted lumber for awhile in the morning, and along about noon Ragsdale started loading his mill, and I helped load out the mill.

Q. Was that the Saturday before the fire?

A. Yes.

Q. Where was the mill when you started to load it out on the Saturday before the fire?

A. The mill had been pulled out in front of the building on Third Street.

Q. Did you have occasion on that Saturday to go into the shed?      A. Yes.

Q. What took you into the shed on the Saturday before the fire?

A. Mr. Ragsdale had some pieces of iron and part of his mill that was in boxes inside the shed that I picked up with the lumber stacker and loaded on the truck for the mill. [371]

Q. Prior to the start of the fire had you ever gone into the shed to look at lumber, to take it on an order?

A. Only one time that I can remember of that I ever took any lumber out of there.

Q. During the time that you worked there did you ever stack any lumber in the shed?

(Testimony of John E. Wilson.)

A. No.

Q. Or did you ever see any lumber being stacked in the shed?      A. No.

Q. On the Saturday before the fire was there redwood molding stacked along the west wall of the shed?

A. I didn't see any redwood molding there, no.

Q. Did you see any redwood molding stacked in the shed on the Saturday before the fire?

A. No, I did not.

Q. Did you see any lumber in the shed the Saturday before the fire?

A. The only lumber I remember seeing in there was scraps that was scattered around on the floor there.

Q. Where was that lumber located?

A. Well, as you come in the back door where we parked the cars there was scrap lumber floors. A dirt floor. It was on the ground, scattered around there.

Q. At any time during the period that you worked did you [372] see vertical grain redwood molding stacked with or without stickers in that shed area?      A. No.

Q. After the fire did you do any work for Eureka Lumber Company?

A. Yes, I worked a few days.

Q. Were your wages paid up at the time of the fire?      A. No.

Q. Are they paid up now?      A. No.

Q. Approximately how much is owed you in

(Testimony of John E. Wilson.)

wages?      A. Something around \$100.

Mr. Castro: I believe those are all the questions I have, your Honor.

Cross Examination

Q. (By Mr. Hilger): Mr. Wilson, your job was sort of roustabout, wasn't it?      A. Yes, it was.

Q. You stacked lumber, and sorted it, outside, mostly?      A. Yes, sir, I did.

Q. That is all you did for these people at the Eureka Lumber Company was that type of labor?

A. That is right.

Q. On the Saturday before the fire you say before you had anything to do with this Ragsdale mill it had already been [373] pulled out of the building, is that right?      A. That is right.

Q. And you went into the building to get some irons for Mr. Ragsdale?      A. Yes.

Q. How far into the building did you go at that time?

A. I came in the back door with a small lumber stacker and pretty well—about two-thirds of the way in, I would say, was a box of pieces to his mill. It was a box about so big (indicating), of iron, that I picked up.

Q. Then you backed up with your stacker?

A. Out the back door, yes.

Q. How high were these stacks of scrap around, as you described them?

A. The only scraps I remember seeing were just on the floor around the back door where we dropped the stacker. It was just around on the floor.

(Testimony of John E. Wilson.)

Q. You made a claim, also, against the Eureka Lumber Company, did you not, for wages that you said you had not received? A. That is right.

Q. You swore you had not received them?

A. Yes.

Q. And you had, in fact, received them in cash, hadn't you? [374] A. No.

Q. It is a fact your matter was dismissed by the Division of Labor Law Enforcement when you refused to swear that you had not been paid, isn't that true?

A. I asked them to dismiss it.

Q. Yes, I am sure you did.

That is all.

#### Redirect Examination

Q. (By Mr. Castro): Mr. Wilson, would you indicate with a pencil where you drove the stacker in to remove the box?

A. As I remember there was, well, I think the one mill was in here, and I think the iron was in this area, in front of the mill here (indicating).

Q. Will you mark it with an "X"?

A. (Witness marks on diagram.)

Q. Then you entered from the railroad side of the building? A. Yes.

Q. Can you tell me which of these doorways you came in?

A. Well, it was the doorway we always came in to park the stackers. I would say it was this door (indicating).

(Testimony of John E. Wilson.)

Q. Will you draw a line through the door down to the box?

A. I think I came straight through. As nearly as I can remember, the building was empty. [375]

Mr. Castro: May we make that line a little heavier and mark it "W-1," at the south end, and "W-2," at the north end?

You can take the chair again.

I believe those are all the questions I have, your Honor.

Mr. Hilger: I have a question or two more.

#### Recross Examination

Q. (By Mr. Hilger): You are appearing here at the request of the defendant, aren't you?

A. I was subpoenaed to appear here, yes.

Q. You were subpoenaed by the defendant, too, weren't you? A. Yes.

Q. How much are you getting paid to come down here to testify? A. My expenses.

Q. How much are your expenses?

A. Well, my wages are \$16.80 a day. My wife had to come with me. She makes between \$10.00 and \$15.00 a day. And we have five children, and we had to make arrangements for our children we left there, which probably will amount to \$8.00 a day.

Q. Keep going. How much did it cost you to travel down [376] here?

A. I haven't kept a record of it.

Q. How much are you going to put in for?

A. Well, I had an understanding with Mr.

(Testimony of John E. Wilson.)

Young up there that he would take care of it. He asked if \$71.00, in addition to the \$52.00 he give me, would take care of everything, and I said it would.

Mr. Hilger: I will bet it would. Thank you.

Further Redirect Examination

Q. (By Mr. Castro): Mr. Wilson, you have a family of five? A. That is correct.

Q. What is the age of the eldest?

A. Fifteen is the eldest.

Q. And the youngest? A. Six.

Q. Have you been sick in the past?

A. I have been sick——

Mr. Hilger: I will object to this as being immaterial.

The Court: I will sustain the objection.

Q. (By Mr. Castro): Was it necessary because of your physical condition that your wife was required to make the trip with you?

Mr. Hilger: I object to that as leading. [377]

The Court: I will sustain the objection.

Q. (By Mr. Castro): Mr. Wilson, have you told anything but the truth concerning your knowledge of that shed? A. No.

Mr. Castro: I have no further questions.

The Court: That is all.

Mr. Castro: May the witness be excused?

The Court: Yes, he may be excused.

(Witness excused.)

## ORLEN HOWARD

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Will you state your name to the Court and Jury?

A. Orlen Howard.

## Direct Examination

Q. (By Mr. Castro): Where do you live, Mr. Howard? A. I live in Eureka, California.

Q. How long have you made your home in the Eureka area? A. Fourteen years.

Q. Married man with a family? A. Yes.

Q. You appear here under a subpoena?

A. That is right.

Q. And you received a fee with your subpoena, did you? A. I did.

Q. And the amount of that fee was \$52.00?

A. That is right.

Mr. Castro: Will the Court take judicial notice that that is the statutory fee required for witnesses from Eureka to the City of Sacramento?

The Court: I don't know. If you say it is——

Mr. Castro: That is what the marshal's office told us.

The Court: Maybe it would have been better for all concerned, counsel, if you had tried this case where it started, up in Eureka. You would have saved an awful lot of expense and trouble.

Mr. Castro: I agree with your Honor.

The Court: You moved it to the Federal Court.

(Testimony of Orlen Howard.)

Mr. Castro: Yes. But there is a Federal Court, I understand, in Eureka. But they sit in Sacramento.

Q. (By Mr. Castro): Mr. Howard, what is your business?

A. I am a paid fireman in Eureka.

Q. How long have you been a paid fireman in the City of Eureka? [379]                      A. Nine years.

Q. Is a paid fireman a full-time job?

A. Yes, it is.

Q. Do you have any part-time job on your day off, or anything of that kind?

A. Just occasionally; just subject to call when they are short-handed.

Q. Were you on duty in the Fire Department on June 25, 1956, when a fire took place at the Eureka Lumber Company?                      A. Yes, I was.

Q. Did you respond to the fire alarm?

A. Yes.

Q. About how far is it from the Fire Department to the Eureka Lumber Company Building?

A. Oh, I would say in the vicinity of seven blocks.

Q. How did you go to the scene of the fire?

A. I drove the truck down to C Street, and then over on Fourth, down Fourth to Commercial, and from Commercial Street over to Third.

Q. Were you the lead truck?

A. No, I was the second machine.

Q. (By The Court): You mean a fire truck, I take it?                      A. Yes, sir. [380]

(Testimony of Orlen Howard.)

Q. (By Mr. Castro): Where did you bring your truck to a stop when you reached the scene of the fire?

A. I brought my truck to a stop on the Third Street side headed towards Broadway from Commercial.

Q. The diagram which is Exhibit A, I explained that to you just before the two o'clock session.

A. Right.

Q. Do you feel that you understand that diagram? A. I do.

Q. After you parked your truck, then, in that Third Street area——

A. I parked it just long enough to unload my line and go into a hydrant.

Q. What hydrant did you tie into?

A. I tied into Third and Broadway.

Q. That would be to the west? A. Right.

Q. Would that be near Mr. Musser's truck?

A. It would be right on the corner by his place.

Q. And after you parked your truck there and tied in your line where did you take your line?

A. That line went in on the west side where the main part of the fire was.

Q. Do you know who took the line in?

A. No, I couldn't say which one of the firemen took it. [381] There were two other lines laid in the same place.

Q. Did you take a line into any part of the building?

(Testimony of Orlen Howard.)

A. Yes, I took a line off the Commercial Street side between Second and Third on the side door.

Q. There is a door which has been marked here "Loading Door," with a Roman Numeral "II." Would that be the door?

A. That would be the door I went through, yes.

Q. Was that door forced open so that you could get into it? A. Yes, it was.

Q. Who forced it open?

A. That I don't recall. We had several men working there.

Q. I will show you a photograph taken on August 10, 1956. Do you recognize that photograph?

A. Yes, that is on the commercial street side, where the side door is.

Q. Does that indicate the door through which you entered the building? A. Yes, sir.

Q. When you entered the building in what direction did you go after you entered the loading door?

A. Went into the west, on into the building, in that one storage room there right off of that door, where the fire had burned through in one place.

Q. Would you take the pointer and point out your course as you came through the loading door?

A. When I came through the door here there had been a fire truck in about this area, here (indicating).

Q. Will you put an "X" at that area?

A. (Witness marks on diagram.)

(Testimony of Orlen Howard.)

Mr. Castro: May we mark that "H-1," your Honor (marking on diagram)?

Q. (By Mr. Castro): Did you observe fire coming into that room at any other point than H-1 when you went in there?

A. There was little spot fires in between the ceiling, in the rafters which the ceiling was nailed to. We had to pull the sheet rock down and put those out. There wasn't a tremendous lot of fire, but there was fire in between.

Q. I will show you another photograph taken on August 10, 1956. Does it show the ceiling area from which you pulled down the ceiling?

A. Yes, it does, very clearly.

Mr. Castro: I offer that photograph in evidence as defendant's exhibit next in order, your Honor. I apparently missed on offering the other photograph. I will offer it first.

(Whereupon the photograph referred to was marked Defendant's Exhibit O in evidence.)

Mr. Castro: That is the photograph on the Commercial Street side, showing the side door.

(Whereupon the photograph referred to was marked Defendant's Exhibit P in evidence.)

Q. (By Mr. Castro): Where did you go in that storage room? What was the line of your progress? What direction did you take?

A. We went to the south area. Quite a little fire had come in from this other side by the steps and in the office part, and we worked along in there in order to put a stop in there.

(Testimony of Orlen Howard.)

Q. You are indicating the area marked "Stairs"?

A. Right in here (indicating). We worked right on down. There were several fellows with me. We called out 200 volunteers on that fire.

Q. I show you Exhibit G. Does that show the front end of that office to which you were proceeding, on the downstairs side?

A. Yes. The window is facing the Third Street side.

Mr. Castro: May we show these three photographs to the jury at this time, your Honor?

The Court: Very well.

(Whereupon the photographs referred to were handed to the jury.)

The Court: Is that all of the witness? [384]

Mr. Castro: Yes, your Honor. I do have one or two more questions of the witness.

Q. (By Mr. Castro): When you were in that office area could you tell where the fire was coming from? You have indicated it had burned through at a point, H-1.

A. That is right. The main part of the fire was coming from the west side of the building.

Q. At any time did you enter the room which I am now pointing to, and which has been referred to as the southwest room, before you went upstairs?

A. No, I did not.

Mr. Castro: Those are all the questions I have on direct examination.

The Court: Any questions?

(Testimony of Orlen Howard.)

Mr. Hilger: Yes, I have one question.

### Cross Examination

Q. (By Mr. Hilger): Did you say you had to call out 200 volunteers?

A. We have 200 volunteers in the City of Eureka, and we pulled a general alarm, and that is to call all the volunteers out.

Q. That was a pretty big fire, then, wasn't it?

A. It was a big fire.

Q. It was a hot fire, then? [385]

A. Very hot.

Mr. Hilger: That is all.

(Witness excused.)

### ALFRED BREEN

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Will you state your name to the Court and to the Jury?

A. Alfred Breen.

### Direct Examination

Q. (By Mr. Castro): Where do you live, Mr. Breen? A. Eureka, California.

Q. And you have lived there approximately how long? A. Approximately 20 years.

Q. Are you a married man with family there?

A. Yes.

Q. What is your business?

A. I am employed by the City of Eureka as a fireman—Eureka Fire Department.

(Testimony of Alfred Breen.)

Q. Is that full-time duty with the Fire Department?      A. Yes, sir.

Q. Approximately how long have you been in the Fire Department? [386]

A. I am completing my sixth year.

Q. Were you on duty the day of June 25, 1956, when the fire took place at the Eureka Lumber Company?      A. Yes.

Q. About what time was the alarm received at the Fire Department?      A. At 12:21.

Q. Is that morning? A.M. or P.M.?

A. That would be A.M.

Q. Morning? Was it in the daylight hours?

A. Daylight hours.

Q. That is P.M.      A. P.M. Excuse me.

Q. Have you ever been a witness before?

A. No.

Q. You just relax and take it easy. Did you respond with one of the trucks to that fire?

A. Yes.

Q. Were you in the first truck, the second truck, or how did you get there?

A. The lead machine, the first truck.

Q. Where was that machine brought to a stop?

A. It was brought to a stop at Third Street and Commercial.

Q. What was done at that time so far as you were concerned? [387]

A. My duty at that time was to break the hose and make the connection of the nozzle.

Q. Did you perform that job?      A. Yes.

(Testimony of Alfred Breen.)

Q. Then what did you do?

A. I led into the fire with a hose line?

Q. Where did you lead into the fire?

A. On the west side of the building.

Q. Before the two o'clock session did I explain to you this particular diagram? A. Yes, sir.

Q. Do you understand the locations on it so I could ask you questions? A. I do.

Q. Which side of the building did you enter from? A. It would be the west side.

Q. Was there a door through which you entered, or did you have to cut an entrance?

A. I had to break an entrance.

Q. Approximately how far from the Third Street side did you break that entrance?

A. I would say about a third of the way, third of the building in from the street.

Q. I show you a photograph taken August 10, 1956. Do you recognize the content of that photograph? [388] A. Yes, I do.

Q. Is that a view taken from the Broadway side of the building looking toward the west side of the building? A. That would be, yes, sir.

Q. Does that photograph show the area through which you made your entry into the shed?

A. Yes.

Mr. Castro: We will offer this photograph in evidence as defendant's exhibit next in order.

(Whereupon the photograph referred to was marked Defendant's Exhibit Q in evidence.)

Q. (By Mr. Castro): When you made your

(Testimony of Alfred Breen.)

entry into the west wall there were you playing a hose ahead of you, playing the force of the hose ahead of you?      A. Yes.

Q. Just describe where you worked to as you fought that fire.

A. From this diagram?

Q. Yes. There is a pointer right behind you.

A. The access hole that I had to cut, as I said, was approximately a third of the length of the building, and that would take me into this area (indicating).

Q. You are indicating an area near the mark X-3. What did you encounter when you got into that area so far as [389] equipment was concerned?

A. There was a stacker, or a lumber-piler, a mechanical affair—a lumber stacker.

Q. Did you go around that lumber stacker?

A. Yes, I did.

Q. Which side did you go around that lumber stacker?

A. I went to the right side of the stacker.

Q. Then where did you go?

A. Over the right side of the stacker, forward.

Q. When you say forward, would you be going toward the east side of the building?

A. Yes. My advance would be in this direction (indicating).

Q. Did you encounter a portable sawmill in the building?      A. Yes.

Q. Did you encounter any lumber in the building as you approached, prior to the time you

(Testimony of Alfred Breen.)

reached the left side that you have referred to?

A. No.

Q. About where did you first encounter lumber in the building?

A. The lumber that I encountered was forward of the stacker, over in about this area (indicating).

Q. Where was it with relation to the bunker or stop end of the portable sawmill? [390]

A. At the end.

Q. Would that be the end toward the railroad tracks? A. Yes.

Q. Was any of that lumber that you saw there stacked? A. No.

Q. Just describe the lumber as it appeared to you when you saw it.

A. It appeared to be scattered, just like it was thrown in a heap.

Q. Did you put the fire out in that area where you saw this lumber? A. Yes.

Q. Did you have any difficulty putting the fire out in that area where you saw the scattered lumber?

A. Well, as I remember, it was very stubborn.

Q. What does that mean to you?

A. To me it means the pile would have to be overhauled. It would have to be taken up piece by piece with a pickaxe or a hook, pulled out and water played on it at the same time to knock it down.

Q. Is that what was done in that area?

A. Yes.

(Testimony of Alfred Breen.)

Q. While you were fighting the fire in that area did you make any observation concerning any odors with relation to the fire that you were fighting?

Mr. Hilger: What was that word?

Mr. Castro: "Odors."

Mr. Hilger: Odors. Smells?

Mr. Castro: Smells.

A. Yes, there was a smell at that particular time.

Q. (By Mr. Castro): Would you describe the smell that you noticed at that point?

A. I would say that the smell was petroleum products.

Q. After you got the fire out in that scattered lumber did you see any lumber stacked any place in that shed? A. You mean piled lumber?

Q. Yes; stacked. A. No.

Q. Did you have an opportunity later on to look at this lumber that you had taken out from the pile that you have described?

A. Yes, I had to travel back and forth across it.

Q. Would you describe the character or kind of lumber that was?

A. Well, to me it was trash.

Q. What does that mean to you?

A. Well, scrap.

Q. Are you familiar with vertical grain red-wood molding? A. I could recognize it. [392]

Q. Did you see any of that in this area that you have been describing? A. No.

(Testimony of Alfred Breen.)

Mr. Castro: May I show the photograph now to the jury?

The Court: Very well.

(Whereupon the photograph referred to was handed to the jury.)

Q. (By Mr. Castro): I show you a second photograph taken August 10, 1956. Does that also show the west side? A. Yes.

Q. Does that also show the area through which you cut your hole? A. Yes.

Mr. Castro: May we offer that in evidence as defendant's exhibit next in order?

(Whereupon the photograph referred to was marked Defendant's Exhibit R in evidence.)

Q. (By Mr. Castro): Did you observe any redwood molding of any kind stacked along the west wall in the area which is marked "Redwood Molding"? A. No.

Q. After the fire, after you were in there, apart from [393] the portable sawmill itself, the diesel engine to the left, were there any other obstructions in the way of equipment in the building in that shed area? A. In this main part?

Q. Yes. A. I didn't encounter any.

Q. Did you encounter any lumber as you fought that fire until you reached the bunker end of that sawmill? A. No.

Mr. Castro: Those are all the questions I have on direct, but I would like to show the jury this photograph.

(Testimony of Alfred Breen.)

(Whereupon the photograph referred to was handed to the jury.)

Mr. Castro: I believe one of our witnesses has come into the courtroom, your Honor,—a witness not on this subject matter. But I think you had better instruct him to leave.

The Court: Tell him to leave.

Aren't these photographs repetitious? I have looked at some of them. So many of them cover the same side of the building.

Q. (By Mr. Castro): Is that the manner in which you pulled out the lumber at the edge of the bunker? A. Yes. [394]

Mr. Castro: We will offer it in evidence as defendant's exhibit next in order.

(Whereupon the photograph referred to was marked Defendant's Exhibit S in evidence.)

Mr. Castro: Those are all the questions I have on direct examination.

#### Cross Examination

Q. (By Mr. Hilger): Mr. Breen, you made your entry here about a third of the way down the west side, is that right? A. That is correct.

Q. That would be along about in here, somewhere along in there (indicating)?

A. That is right.

Q. And you encountered, just inside where you made your entry, a lumber stacker type of machine, is that correct? A. That is correct.

Q. Let us mark that down if we may. Would

(Testimony of Alfred Breen.)

you like to step up here and mark where you found that stacker?

A. I would say it was about in this position, here (indicating).

Q. Draw us a square and label it "Stacker," if you will.      A. (Witness marks on diagram.)

Q. Where did you find the pile of lumber as you worked your way across? You went directly east, did you not? [395]      A. Yes.

Q. Where was the pile of lumber?

A. The lumber was at this platform, here, if this square represents the sawmill (indicating).

Q. Yes. Will you write in there "Lumber," if you will, where you think would be proper?

A. What does this line represent?

Q. Let's see.      A. The outside of the——

Q. No, the sawmill is down here, I think, next to the door. The sawmill extends 40 feet into the building. It would start here and go up approximately 40 feet this way (indicating). Now, if you want to find the end of the sawmill, that is about where it is.

A. That is the center wall. This is lumber in this area (indicating).

Mr. Hilger: Do you want that labeled?

Mr. Castro: Please do.

Q. (By Mr. Hilger): That was a stubborn pile of lumber, you say, to be put out. It had to be broken apart and extinguished?

A. Yes, I would say it was, yes. I did.

(Testimony of Alfred Breen.)

Q. And you worked on that after you first got in the fire for some period of time?

A. Yes. [396]

Q. The rest of it was burning elsewhere while presumably other people were working on it?

A. That is correct.

Q. This area up here was blazing, was it not, and all through there during that period of time?

A. The fire, as I saw it—my work was concerned with this portion of the building, the overhead and the stanchions.

Q. And there was flame through here while you worked on the flame down here (indicating)?

A. It was burning, yes, sir.

Q. It was burning over here, too, wasn't it?

A. Yes.

Q. You did not make any inspection to see whether there was any lumber until after you got through putting the fire out, did you?

A. I was concerned with the fire in that particular spot.

Q. And not in any other spot. It was not your object or concern to put out the fire some place else; you were putting it out——

A. Where I was working.

Q. That is right.

A. You might say where I was detailed.

Q. The rest of it was burning like Rome while you were putting this down?

A. That is right. [397]

(Testimony of Alfred Breen.)

Mr. Castro: I object to the question as argumentative.

The Court: I am sorry, I didn't hear what you said.

Mr. Castro: I will withdraw the objection.

Q. (By Mr. Hilger): Who turned in the alarm, Mr. Breen?      A. I don't know.

Q. You didn't receive it?      A. No, sir.

Mr. Hilger: That is all.

### Redirect Examination

Q. (By Mr. Castro): Mr. Breen, was there overhead fire in this shed area?

A. Yes, there was.

Q. What was that overhead fire from?

A. What was it from?

Q. Yes. I mean, what was burning in the overhead?

A. Well, two-by-fours, or trusses, the stanchions, but there was fire over our head in the spot that I was working.

Q. That was where the fire was being transmitted through that shed area?      A. Yes.

Mr. Castro: Those are all the questions I have.

The Court: As soon as the jury finishes with the [398] photograph we will take a recess.

(Witness excused.)

(Recess.)

NEAL A. JENSEN

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

The Clerk: Will you please state your name to the Court and to the Jury?

A. Neal A. Jensen.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Jensen?

A. Usually in Eureka, California.

Q. Are you related to the Hyrum Jensen who is the plaintiff in this case? A. No, I am not.

Q. You have been subpoenaed to be a witness here, have you not? A. I have.

Q. Are you acquainted with Hyrum Jensen?

A. Yes, sir.

Q. Were you acquainted with Harold Dee Jensen? A. I was.

Q. Were you acquainted with the Eureka Lumber Company in [399] the City of Eureka?

A. Yes, sir.

Q. Did you ever work at the Eureka Lumber Company? A. Yes.

Q. When did you work at the Eureka Lumber Company?

A. I worked there two different times. I think possibly the first time was in about 1952.

Q. Did you work there later?

A. And I worked there in 1956, I believe,—1955 or 1956, after the fire.

Q. Do you recall the fire that occurred at the

(Testimony of Neal A. Jensen.)

Eureka Lumber Company?                      A. Yes, sir.

Q. Were you in the city on the day of that fire?

A. I was.

Q. In the vicinity of the Eureka Lumber Company at the time you became aware of the fire?

A. Yes, sir.

Q. Where were you at the time that you first became aware of the fire?

A. I was in the office of Louis H. Hess Company, which was just across the street on opposite corners.

Q. From the Eureka Lumber Company?

A. Yes, sir.

Q. I will show you a photograph. Does that show the [400] Hess office?                      A. Yes.

Q. And the Eureka Lumber Company?

A. That is right.

Mr. Castro: I offer it in evidence as defendant's exhibit next in order.

(Whereupon the photograph referred to was marked Defendant's Exhibit T in evidence.)

Q. (By Mr. Castro): What had brought you to the Hess office on that occasion?

A. Well, I had gone down to the Eureka Lumber Company's office to get some lumber.

Q. Was anybody with you on that trip?

A. Yes.

Q. Who?                      A. Mr. Sterling Johnson.

Q. Did you pick up some lumber on that occasion?                      A. I did, yes.

Q. Where did you pick up the lumber?

(Testimony of Neal A. Jensen.)

A. I picked up the lumber just directly across Third Street from the office entrance, the office of the Eureka Lumber Company.

Q. This diagram, which is Exhibit A, I explained that to you shortly before two o'clock to-day? [401]      A. Yes.

Q. Do you understand it?      A. I do.

Q. The Third Street you had reference to is the lower portion?      A. That is right.

Q. The office section that you have reference to was this portion of the building (indicating)?

A. The office is in the corner of Commercial and Third Street.

Q. And you picked up some lumber in a space south, or across Third Street?

A. Across Third Street from the lumber company's office.

Q. Was Mr. Johnson with you when you were picking up that lumber?      A. Yes.

Q. Before picking up that lumber had you gone into the office of the Eureka Lumber Company?

A. I had.

Q. Did you see anybody when you went into the office of the Eureka Lumber Company?

A. Yes, sir.

Q. Whom did you see?

A. Well, I first met Mr. Jensen, Hyrum, and the bookkeeper, with whom I am personally acquainted. [402]

Q. What was her name?

A. Mrs. Van Harpin, I believe. After exchanging

(Testimony of Neal A. Jensen.)

ing greetings with them Dee came into the office and we talked for a few minutes, and I told them why I was there and what I wanted. And Mr. Hyrum Jensen told me to go out in the yard and find what I wanted. He said, "You know the stock about as well as I do."

So I did. I went out, found what I wanted, and proceeded to load it into the truck.

Q. Did you see Mr. Hyrum Johnson in the office building there?      A. Mr. Hyrum Jensen?

Q. Jensen. I am sorry.

A. Yes, I visited with him there.

Q. While you were loading the truck did you have occasion to see Dee on the outside of the building?      A. Yes.

Q. Where did you see Dee on the outside of the building?

A. Well, Dee came from the direction of the office over to where I was loading, across the street, and rather cater-cornering in a direction like this (indicating), and asked me if I was finding what I wanted. I told him I had, and offered to give him the tally, but he told me to keep track of it. He said, "Give it to Mrs. Kellam, the book-keeper in Mr. Hess' office." [403]

Q. Then did you see Dee Jensen any more before you learned of the fire?

A. Well, after Dee talked to me there he went west on Third Avenue and turned up Broadway.

Q. Was he walking?

(Testimony of Neal A. Jensen.)

A. Yes, he was walking at the time. He was going to lunch.

Q. And he was walking at that particular time?

A. Yes.

Q. After he left you did you go ahead and complete loading your lumber? A. Yes.

Q. After you completed your job where did you go?

A. I went over to the Hess Company's office and gave the tally of the lumber I got to Mrs. Kellam, the bookkeeper.

Q. Who was with you in the Hess Company office? A. Mr. Sterling Johnson.

Q. Anybody else?

A. Well, Mrs. Kellam, the lady I was getting the load for and doing some work for, was there; and Mrs. Anna Hess, the owner of the business.

Q. Did anything unusual occur while you were standing there in that office?

A. Yes. I was on the front side of the counter and standing beside me was Sterling Johnson. Mrs. Kellam was over here [404] taking the tally, and Mrs. Hess was standing like that, there (indicating). And an explosion occurred, like, well, you might say dynamite. Probably not quite so sharp. And Mrs. Hess said——

Q. (By The Court): Don't say what was said. Just say what happened. A. Well,——

Q. (By Mr. Castro): Did you look any place after you realized that something had taken place?

A. Yes, I looked out the window just right be-

(Testimony of Neal A. Jensen.)

side me, and there was a volume of smoke coming out of the Eureka Lumber Company's building.

Q. About how big are those windows along the west side of the Hess office through which you were looking?

A. I imagine they are about at least eight or ten feet.

Q. High?

A. Well, they are possibly eight feet high and ten feet wide.

Q. What did you do when you saw that smoke?

A. I said to Mrs. Kellam——

Q. (By The Court): Don't say what you said; just what you did.

A. I ran over to the Eureka Lumber Company's office and tried to get in. [405]

Q. (By Mr. Castro): How close were you to the front door of the Hess office when you saw that smoke?

A. About as far from here to that railing.

Q. Two and a half to three feet?

A. That is right.

Q. When you came out of the front door did you then look in a general westerly direction toward Broadway? A. Yes, I did.

Q. Then what did you do when you got out on the street?

A. Well, I ran across the street and tried to get into the Eureka Company's office.

Q. Did anybody run with you?

A. Mr. Johnson.

(Testimony of Neal A. Jensen.)

Q. Where did you try to enter the office of the Eureka Lumber Company?

A. The front door.

Q. This door which has been marked here with the Roman Numeral "I" has been indicated as the front door of the office. Is that the door you have reference to?

A. That is right.

Q. Were you able to open that door?

A. No; the door was locked.

Q. When you found that door was locked where did you go?

A. I went back to the Hess Company's office.

Q. Then what did you do after you had gone back? Did you make any entry into the shed portion of the building after you found the front door was locked?

A. Yes, I did. We ran back again to the Eureka Lumber Company and ran out into the shed on the side, the warehouse.

Q. You are familiar with the sawmill that was located in that shed?

A. Yes.

Q. And the sawmill area is marked on the diagram, the first door west of the office. Will you point where you entered the shed?

A. Well, the first time over the sawmill was standing pretty well up the front, and I entered about——

The Court: What did he say?

Mr. Castro: He said "the first time over"——

The Court: The other way, is that right?

Q. (By Mr. Castro): Speak a little louder.

(Testimony of Neal A. Jensen.)

A. The first trip over I came over and went in this door, jumping over the front of the sawmill, and went around behind here (indicating). But there was no fire yet in this part of the building.

Q. How far did you go into that shed building at that time?

A. Well, I went around to the back end of the sawmill [407] possibly 40 feet, 30 feet.

Q. Did that give you a view looking toward the railroad track side of the building?

A. Yes.

Q. Was there any fire anywhere in that shed area?

A. Not at that time. There was none on this side of the partition.

Q. You are referring to the dividing partition between the east and west halves of the building?

A. That is right.

Q. Could you see any fire when you got in there?

A. Well, we could see between the cracks in the boards. The boards are uprights, and there was a crack between them, but we could see the fire over here all right (indicating).

Q. The boards you are referring to, are they the boards in the dividing partition?

A. That is right, the boards in the partition.

Q. Will you point out on the diagram where you saw flames beyond that partition?

A. Well, looking through here (indicating) we

(Testimony of Neal A. Jensen.)

could see flames and smoke over here, but exactly, the exact spot they were, I don't think I stopped to look. All I seen was a mass of flames in there.

Q. Would that be in this room which has been described as south—we have referred to this room at the southwest [408] room—is that the room in which you looked?

A. I really think the fire, on the first trip over, was in this room (indicating).

Q. You were looking from the partition here (indicating)?

A. The fire was in this room, next to this partition.

Q. Could you mark about where you looked through?

A. This is as well as I remember. It would be right about there (indicating).

Q. This is the partition dividing the shed?

A. That is right.

Q. Is this the partition that you looked through?

A. That is right.

Q. Will you mark on that partition where you looked through? A. (Witness indicates.)

Q. No. The part of the partition you were looking through. Just put an "X" for the general location. A. Right about there (indicating).

Mr. Castro: May we mark that "J-1," Your Honor?

Q. (By Mr. Castro): From J-1 did you then have a view into this southwest room? Could you see the flames in there?

(Testimony of Neal A. Jensen.)

A. Looking through the cracks we could see flames, yes.

Q. After you saw those flames what did you do?

A. Well, on the first trip, after the first trip we [409] hurried back over to the Hess office to see if they got in contact with the Fire Department.

Q. What did you do after you reached the Hess Company office?      A. We ran back again.

Q. And then did you make any other entry into the shed portion?      A. Yes.

Q. On your second entry into the shed where did you go?

A. Well, the second entry, we came over to the west door and came into the west—entered here at that time (indicating). By that time the fire had broken through this wall some.

Q. You are indicating the partition dividing the two halves of the building?

A. That is right. And we came and entered this part of the building there on this side (indicating).

Q. Indicating the west door on the Third Street side?      A. That is right.

Q. How far did you get into the building?

A. Well, I went back about halfway.

Q. At that time did you see fire coming from any place except up in the partition between the two halves of the building?

A. No. The fire was breaking through here in several [410] different places (indicating). It was

(Testimony of Neal A. Jensen.)

up along the roof and was breaking through down, well, near the floor, all the way through.

Q. When you walked in here (indicating), when you got into that partition which you marked J-1, where you looked through the partition, did you see any stacks of redwood molding?

A. Well, I can't tell you that I could designate what the lumber was. There was a pile of lumber there, but I didn't look for lumber, Mr. Castro. I was in a hurry, excited, I presume, on account of the fire.

Q. Did you have any difficulty in reaching the partition to look through? Could you walk right up to the partition?

A. Not on the second trip over.

Q. Oh, the first trip over, Mr. Jensen?

A. I really didn't try. I ran around and stood in back of the mill, at the back end of the mill, to see what progress the fire was making. Then I turned and ran back to the Hess Company office.

Q. You have been in the lumber business for a period of years, have you?      A. Yes, sir.

Q. And you are familiar with what we are talking about when we talked about stacked, as distinguished from piled lumber, are you? [411]

A. Yes.

Q. Did you see any stacks of lumber in the building?      A. Stacked lumber?

Q. Yes.

A. That is usually put up in piles, uniformly

(Testimony of Neal A. Jensen.)

stacked. I didn't see that. I did see a pile of lumber back of the sawmill, as I remember it.

Q. Did you see lumber at any other point when you were in there?

A. Truthfully I couldn't tell you that I did or I did not because, as I said, I was excited, and I was interested in the fire, only.

Q. Do you feel that you can give us a fair opinion as to the amount of lumber that you saw in this pile at the end of the sawmill?

A. No, I couldn't do it, I am sure.

Q. Did you remain at the scene of the fire during the entire time that the fire was fought there?

A. Yes, I did.

Mr. Castro: Those are all the questions I have on direct examination, Your Honor.

#### Cross Examination

Q. (By Mr. Hilger): Mr. Jensen, when you went back over to the Hess office after your first trip over, did you ascertain whether or not [412] the alarm had been turned in to the fire Department at that time?

A. The alarm—we tried on several occasions to find out if it had go through, and finally, when we went back over the second time we stood there, and during the time we were standing there they got hold of the Fire Department and got the alarm through.

Q. How long had that been after your first trip

(Testimony of Neal A. Jensen.)

over to the lumber company after you discovered the fire?

A. Well, I think it was from six to ten minutes.

Q. And then how long was it after that before the Fire Department showed up?

A. Twenty minutes.

Mr. Hilger: Thank you. That is all.

Redirect Examination

Q. (By Mr. Castro): Mr. Jensen, did you take your watch out to check any times?

A. I did. May I say that not only myself, but Mr. Johnson and Miss Kellam checked with me.

Q. Has Mr. Hyrum Jensen asked you to be a witness in this case?      A. No, sir.

Mr. Castro: I believe those are all the questions I have, Your Honor. [413]

Mr. Hilger: I have no questions.

The Court: That is all.

(Witness excused.)

The Court: I notice that some of the jurors talk with one another in the jury box. I meant to caution you that there is no objection to your talking to one another, as long as you do not talk about the case, because you are not supposed to discuss the case itself until it is finally submitted to you. But you are at liberty, of course, to talk with one another on anything except the case while you are in the jury box or elsewhere.

Mr. Castro: Your Honor, may I show them Ex-

hibit D, which is a photograph of the Hess buildings?

The Court: All right.

(Whereupon the photograph referred to was handed to the jury.)

### HAROLD McBETH

called as a witness on behalf of the defendant, being first duly sworn, thereupon testified as follows:

Q. (By the Clerk): Please state your name to the Court and to the Jury.

A. My name is Harold McBeth, of Eureka, California.

Direct Examination [414]

Q. (By Mr. Castro): Where do you live, Mr. McBeth?

A. I live at 735 Buhne Street, Eureka, California.

Q. How long have you made your home in the Eureka area? A. Forty-eight years.

Q. You are a married man with family there?

A. Yes, sir.

Q. What is your business or occupation?

A. I am a fireman in the Eureka Fire Department, and I have charge of the Fire Prevention Bureau.

Q. How long have you been in the Eureka Fire Department? A. Fourteen years, sir.

Q. In June of 1956 what, generally, were your duties in the Fire Department?

A. In June of 1956 I was fire—still had charge of the Fire Prevention Bureau.

(Testimony of Harold McBeth.)

Q. Were you familiar with the Eureka Lumber Company Building?      A. Yes, sir.

Q. On Third and Commercial Streets?

A. Yes, sir.

Q. Had you been there prior to the fire of June 25, 1956?      A. Yes, sir.

Q. Now, do you appear here under a subpoena that was directed to you to appear here?

A. Yes, sir. [415]

Q. Asking you to bring certain records relating to this fire?      A. Yes.

Q. And have you brought those records?

A. I have.

Q. Does the Eureka Fire Department have a system of alarms?

A. Yes, sir; the Gamewell System.

Q. How are those alarms recorded at the Department?      A. By tape, sir.

Q. Do you have the tape which gave the alarm for the Eureka Lumber Company fire?

A. I do, sir.

Q. Will you produce it at this time?

A. (Witness produces tape.)

Q. Will you show on the tape how you determine the time of recordation?

A. There is a clock on a Gamewell Fire Alarm System that automatically, the minute the alarm comes in, stamps the day, the year, the minute, and the hour.

Q. What was the alarm time on this particular fire?

(Testimony of Harold McBeth.)

A. It is 12:21 p.m., the year 1956, sixth month, and the 25th day.

Mr. Castro: I offer it in evidence as defendant's exhibit next in order. [416]

(Whereupon the tape recording of fire alarm referred to was marked Defendant's Exhibit U in evidence.)

Q. (By the Court): That is some sort of automatic alarm system that you have? It has nothing to do with telephone, has it?

A. No, your Honor, it is the same as a street box out here that you would go to call the fire at.

Q. You pull something down?

A. You pull something down and it records on that in our central fire station.

Q. (By Mr. Castro): Were you at the first station when that alarm was received?

A. No, sir, I was not.

Q. Were you in the City of Eureka at that time?

A. Yes, sir, I was sitting at the lunch table in my home, 738 West Buhne Street.

Q. How far is the Fire Department from this Eureka Lumber Company Building?

A. Approximately five blocks in the way of travel.

Q. Did you go to the scene of the fire after you heard the alarm?

A. I was called to the scene of the fire by the dispatcher of the Eureka Fire Department.

(Testimony of Harold McBeth.)

Q. About what time did you reach the scene of the fire? [417]

A. Oh, I would say approximately 12:35.

Q. Was any of the Fire Department there when you arrived? A. Yes, sir.

Q. What units of the Fire Department were there when you arrived?

A. A thousand-gallon La France pumper. There was a 1,250-gallon Seagrave pumper. There was a 65-foot American La France aerial ladder. And as I was entering the scene of the fire, a 500-gallon Fox pumper was coming up on the scene.

Q. Had lines already been laid when you reached there? A. Yes, sir.

Q. What lines had been laid by the time you reached there?

A. To the best of my knowledge four lines were laid off of the pumper at the corner of Third and Commercial Street. One line was laid off the Seagrave pumper to in front of the Mobiloil Company's plant, which is right opposite Third Street and Broadway. And there was one line laid from the corner of Fourth and Commercial down Commercial Street, across the lot adjacent to the Eureka Lumber Company, and taken off there and carried into the building.

Q. Did you take part in the physical fighting of that fire after you arrived? A. I did, sir.

Q. Did you make any entry into the building?

A. I did. [418]

Q. Where did you make the entry?

(Testimony of Harold McBeth.)

A. Into the back side in the alley adjacent to the spur track.

Q. This diagram that is on the wall, have you seen that diagram?

A. No, this is my first view of it.

Q. The bottom represents Third Street, the right-hand is Commercial, the top represents the railroad tracks. This line to the west represents the shed or open part of the building. The line to the east represents the room or the office section of the building. The doorways are marked "Doors," and have the Roman numerals on them, to which doors were attached. This represents the area where there was a portable sawmill sitting. With that in mind do you think you could indicate where you first made your entry?

A. Yes, sir, if I may have the pointer. I came into this position right back here (indicating). The time I picked up this line there had arrived another thousand-gallon pumper which was hooked up at the corner of Second and Commercial Street. I carried an inch and a half line, and I had better tell the jury we have three sized lines on our equipment in the City of Eureka. We have three-inch hose-lines, we have 2½-inch lines——

The Court: We know you have a pretty good fire department there, but where did you go into the building? That is what we want to know. [419]

The Witness: Right here (indicating).

Q. (By Mr. Castro): That is through Doorway No. III? A. Doorway No. III.

(Testimony of Harold McBeth.)

Q. How did you get into the door? Was it open or was it forced open?

A. It was forced open.

Q. What did you find when you got inside that doorway?

A. A continuous lot of smoke rolling. I had to lie and crawl on my stomach to get at this area over here.

Q. You are indicating the south end of the northeast room?           A. Yes.

Q. Was there any fire burning in that room when you made your entry up to that point?

A. No, sir, it was nothing but billowing smoke, thick, and plenty of it.

Q. Did you stay in that room or get out of it?

A. No, I stayed in that room. I came directly over here where there was a ladder.

Q. You are indicating the southwest corner of the room. Where did that ladder go?

A. That ladder went to a loft above this part of the building.

Q. That part of the building, you are pointing to a portion where there was an upstairs office?

A. Yes, storerooms in the back end. [420]

Q. Did you make any entry into that office?

A. I started fighting the fire here and crawled up here.

Q. About midway?

A. About midway. There are two different partitions in the building.

(Testimony of Harold McBeth.)

Q. Did you observe any flames when you got into the office area? A. Yes, sir.

Q. Were those flames put out?

A. Yes, they were.

Q. Could you tell where the fire was coming from as you were fighting it there in that upstairs area?

A. It seemed to be coming right directly across this area, right in here (indicating).

Q. That is indicating from an area which we call the southwest room. Did you go any place else after you were upstairs there?

A. Yes, I kept on working until I met the boys that were coming up from this end.

Q. Indicating coming up——

A. They came up the stairs here, went through a doorway, and we proceeded to put the fire out in front of the building over the front office as it shows here on the second story.

Q. After you put the fire out on the second story where did you go? [421]

A. I went through many parts of the building starting to put out spot fires and conduct what we call a mop-up.

Q. In the back or the northeast corner room was there a loft along that west wall of it right in here?

A. To the best of my knowledge, no.

Q. You may sit down, Mr. McBeth, if you will, for a moment. Did you remove anything from the building while you were there? A. Yes, sir.

Q. Where were you making your removal from?

(Testimony of Harold McBeth.)

A. We were making our removal here. There was—as I remember, there were some toilets, there were some louvered windows, there was paint. I think mastic. What we did in trying to salvage what we could, we started a line right out through the door to the men who were working outside, passed it out in that position there so we could salvage what was good stuff.

Q. Did you see that merchandise being put on anybody's truck later on?      A. Yes.

Q. Whose truck was that?

A. I think, if I am not mistaken, it was Dee Jensen's pickup.

Q. Did you take pictures while you were there?

A. Yes, sir, I did.

Q. Is that one of your jobs?

A. Yes, sir. [422]

Q. One of your jobs in the fire department is to take pictures during fires?      A. Yes, sir.

Q. Did you take any pictures of the office downstairs?      A. Yes, sir.

Q. Do you have those pictures with you?

A. I do. It will be necessary for me to find them.

Q. (By the Court): You did not take those pictures while the fire was going on?

A. No, sir, after.

Q. (By Mr. Castro): Were they taken the same afternoon of the fire?

A. Yes, sir. These two pictures, sir, are of the office upstairs (indicating).

Q. I was asking about the office on the ground floor there. That would be the southwest room.

(Testimony of Harold McBeth.)

A. No, I am sorry, sir. I made a mistake. I did not take a picture of that, I am pretty sure. That is the warehouse exactly behind—that is the sales room, rather, exactly behind the front office.

Q. Will you point out on the diagram the area that is depicted in this photograph?

A. It would be the area right along this wall.

Q. Would you take the red pencil and draw a line along there? [423]

A. There were shelves, I would say, up to about here.

Q. May we mark the south end of that line as M-1 and the north end as M-2. Were those shelves burned?

A. Not too bad, sir. Just partially where the fire fell through this partition here, and to my mind, if I recall it correctly, it was in about three bad positions there.

Q. Does this photograph which you took show the area where the fire burned through?

A. Yes, sir.

Mr. Castro: I would like to offer this photograph in evidence as Defendant's next in order.

Mr. Hilger: Do you mind if I see it, counsel?

Q. Did you observe the condition of the shelves as to whether there was merchandise on them?

A. Yes, sir, there was.

Q. Does this picture fairly depict the quantity of merchandise?

A. To the best of my knowledge, yes.

(Testimony of Harold McBeth.)

Mr. Castro: I offer it in evidence as Defendant's next in order, your Honor.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit V.)

Q. (By Mr. Castro): Were there some shelves in that storeroom shown in that photograph other than the ones you took pictures of? [424]

A. Yes, across over in here.

Q. Indicating along the east area?

A. Yes, sir. If my recollection is right, sir, there were nail bins over here, and then there was a metal shelf down along in this area here.

Q. I show you a photograph taken August 10th, I believe Exhibit P. Does that pretty well show the over-all condition of those shelves when you were there the afternoon of the fire? A. Yes, sir.

Q. Will you look at this photograph taken August 10th. Do you recognize what it depicts?

A. Yes.

Q. Does it show some portion of that storeroom?

A. Yes, sir.

Q. What portion of the storeroom does that photograph show?

A. It shows this wall over here.

Q. Indicating again the east wall? A. Yes.

Q. Was that the type of merchandise that you saw in there on the afternoon of the fire?

A. Yes, sir.

Q. Was that merchandise left intact there up to the time that picture had been taken?

(Testimony of Harold McBeth.)

A. Yes, sir. [425]

Mr. Castro: I offer that photograph in evidence as Defendant's next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit W.)

Q. (By Mr. Castro): Did you take a photograph of any piles of lumber in the shed area on that afternoon? A. Yes, sir.

Q. May I see those photographs?

(The witness handed photographs to counsel.)

Q. Are these photographs that you just handed me photographs of the lumber areas?

A. Yes, sir.

The Court: Shed area, you said.

Mr. Castro: In the shed area, yes, your Honor.

Q. Was there any merchandise in that room that you first entered marked "Northeast"?

A. Yes, sir.

Q. What did it consist of?

A. The main thing that entered into my mind were a stock of doors.

Q. I will show you Defendant's Exhibit F. Does that depict the merchandise which was in there that afternoon? A. Yes, sir.

Q. What area does this photograph depict?

A. The photograph depicts this area from here right straight through—not clear through, I am sorry, sir—about halfway through, right straight through to this front door.

(Testimony of Harold McBeth.)

Q. That is the west wall of that building?

A. Yes, sir.

Q. Does that show the conditions as you saw them immediately after the fire had been put out in that area?      A. Yes, sir.

Q. Did you see any indication in that area of redwood molding having been stored along that west wall?

A. Not to the best of my knowledge, no, sir.

Mr. Castro: At this time we will offer that photograph in evidence as Defendant's Exhibit next in evidence.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit X.)

Q. (By Mr. Castro): I will show you another photograph. Where did you take that picture?

A. To the best of my knowledge, right in this corner.

Q. That is indicating the northwest corner of the shed?      A. Yes.

Q. Was that the only area where you saw any lumber stacked along that west wall?

A. That is the only part where I found anything along that west wall. [427]

Mr. Castro: I offer that photograph in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit Y.)

Q. (By Mr. Castro): You are familiar with

(Testimony of Harold McBeth.)

vertical grain redwood molding?           A. Yes, sir.

Q. Did you find any vertical grain redwood molding along that west wall area?

A. Along the west wall?

Q. Yes.           A. No, sir.

Q. Did you also take pictures at the base of the sawmill?

A. Yes, sir, I think I have them here.

Q. Are they included in this group that you gave me?

A. I am afraid so. Right here, sir. Here is also another one.

Q. Is this taken from a view further back?

A. Yes.

Q. Will you point out the area that this view shows?

A. The area would show this right around in here (indicating), the end of the sawmill would sit approximately, oh, right about in here.

Q. Would you mark with the red pencil the area shown by [428] that photograph?

A. Right along in here, up to here about like this. Your lumber was piled in front as shown in the photograph.

Mr. Castro: We will mark that area M-3. I offer that photograph in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit Z.)

The Court: We might as well recess.

Mr. Hilger: May we have the remaining picture introduced?

The Court: The last one is Exhibit Z.

Mr. Castro: I have not offered it yet.

The Court: You have not asked him any questions on that.

Mr. Castro: No, I had not.

The Court: We will start in on that tomorrow morning.

Mr. Hilger: May I look over those pictures before the witness is excused this evening?

The Court: Yes, to save time, you may do that. We will take a recess until ten o'clock tomorrow morning, members of the jury.

(Thereupon an adjournment was taken until 10:00 o'clock a.m., Friday, September 27th, 1957.) [429]

Friday, September 27, 1957—10:00 O'Clock A.M.

The Clerk: Jensen vs. Boston Insurance Company.

Mr. Castro: Ready for the defendant.

Mr. Hilger: Ready for the plaintiff.

Mr. Castro: At the close of the testimony yesterday, your Honor, we had offered in evidence certain photographs, and I would ask permission at this time to display those to the jury.

The Court: Very well.

(The photograph last referred to on the previous day was marked Defendant's Exhibit Z, and Defendant's Exhibits V, W, X, Y and Z were thereupon passed to the jury.)

## HAROLD McBETH

having been previously duly sworn, was recalled and testified further as follows:

## Direct Examination—(Continued)

Q. (By Mr. Castro): Mr. McBeth, I believe you had one more photograph of lumber debris which we were just looking at when we recessed yesterday afternoon. I think this was the photograph. What does this view show?

A. Mr. Castro, this shows the view of the diesel engine that runs the portable sawmill. It shows the debris of lumber and also a gallon container that had the odors of diesel in it. That was picked up by myself. [430]

Q. At this time you would be facing toward Third Street when this photograph was taken?

A. Yes.

Mr. Castro: We will offer that photograph in evidence.

(The photograph referred to was received in evidence and marked Defendant's Exhibit AA.)

Q. (By Mr. Castro): How soon after the fire was out did you start taking these pictures?

A. Well, immediately after what we call the mop-up I started to take the pictures, which would be approximately, I would say, in the neighborhood of between 2:30 and 3:00 o'clock.

Q. Had anyone disturbed the debris other than what the firefighters had been doing?

A. Not to the best of my knowledge.

(Testimony of Harold McBeth.)

Q. Was the public excluded from the building at that time?

A. There were a few that needed to be chased out at the time, which happens in all fires.

Q. Reference has been made here to bathtubs in the building at the time of the fire. Did you see any bathtubs in the building at the time of the fire?

A. Yes, sir.

Q. How many bathtubs did you see in the building at the time of the fire?

A. To the best of my knowledge there was only one, in the [431] rear corner of the building.

Q. In what room did you see the bathtub?

A. That would be in the area designated as "Kaiser."

Q. That would be in the room we have marked "Kaiser"?      A. Yes, sir.

Q. And would be in the area of the northeast corner of that room. I show you a photograph. Do you recognize the contents of that photograph?

A. I do.

Q. What area does it show?

A. It shows this area right in here (indicating).

Q. That is the bathtub area that you previously pointed to?      A. Yes, sir.

Q. As to the plumbing fixtures that you saw there, were they new or were they used fixtures in that photograph?

A. I wouldn't like to quote, because to the best of my knowledge they are just in the same conditions that I see them now.

(Testimony of Harold McBeth.)

Mr. Hilger: I will object to further inquiry about this. We do not make any claim for a bathtub.

The Court: What is that?

Mr. Hilger: We make no claim for bathtubs or lavatories. We do not list it.

Mr. Castro: The plaintiff in the case testified that there were bathtubs, toilets, and things of that nature, [432] that were in the building which were destroyed in this fire, and I am therefore showing what was there in the nature of the article.

The Court: If there is no claim, isn't this time-consuming?

Mr. Castro: They are waiving their claim and I want to show the condition.

Mr. Hilger: How can you waive a claim without ever having made it?

The Court: I will sustain the objection. I do not see any point in wasting time on something that is not involved.

Mr. Castro: I ask that the photograph be marked for identification.

(The photograph referred to was thereupon marked Defendant's Exhibit AB for identification.)

Q. (By Mr. Castro): Did you find any toilets other than what was used at the building itself?

Mr. Hilger: Same objection, your Honor.

The Court: No claim made to any bathtubs?

Mr. Hilger: No claim is made for any bathtubs, no claim is made for any toilets.

(Testimony of Harold McBeth.)

The Court: What are we taking up time on that for?

Mr. Castro: The testimony by the plaintiff was that there were such things in the building at the time of the [433] fire. That is why I am offering this testimony.

Mr. Hilger: This witness has already testified he helped remove some of them outside the door, so they were removed.

Mr. Castro: Let the witness testify, Mr. Hilger.

Mr. Hilger: Objected to as immaterial.

The Court: He has already testified that there were some bathtubs.

Mr. Castro: No, he has not.

The Court: Somebody testified that there were bathtubs and they moved them out through the door, and they were taken away in a truck. The plaintiff does not make any claim for them. I will sustain the objection.

Q. (By Mr. Castro): Mr. McBeth, were any bathtubs moved out through the Commercial Street door?      A. No, sir.

Q. Mr. McBeth, were any toilets moved out through the Commercial Street door?

A. Yes, sir, there was one new toilet and toilet bowl.

The Court: I have sustained an objection to that, counsel.

Q. (By Mr. Castro): Were there any other toilets moved out?

The Court: I have sustained an objection to this

(Testimony of Harold McBeth.)

line of inquiry. Why waste time on it? We are not concerned [434] with it. There might have been a thousand things there in the place. If they are not involved in the claim against the insurance company, there is no point in going into them.

Q. (By Mr. Castro): Do you recall two electric motors in the building after the fire?

A. Yes, sir.

Q. I show you Exhibit D. Can you identify those materials in that exhibit?

A. Yes, sir, sitting right back here in the corner.

Q. Would you put an X over those motors?

The Court: Well, they are there. This takes up a lot of unnecessary time. They are there. The witness has testified that they are there.

Mr. Castro: The plaintiff denied that they were in that location, your Honor, so I was asking the witness to identify them in the photograph.

Mr. Hilger: The plaintiff has not denied anything. The plaintiff in fact insists the motors were there, your Honor.

Mr. Castro: May we mark them, your Honor, as X-1 on Exhibit D?

The Court: You take a lot of time with this, Mr. Castro. I have already ruled on it. Pass on to something else.

Q. (By Mr. Castro): Mr. McBeth, did you find any redwood molding in the building after the fire?

A. Yes, there were types and pieces of molding. How much [435] I couldn't tell you.

Q. Was that molding located at any particular

(Testimony of Harold McBeth.)

point of the building?           A. Yes.

Q. Where was that debris located?

A. Throughout this area adjoining the sawmill and throughout in here (indicating). Some of it was scattered by our men, as it was necessary to turn it over to put the fire out.

Q. Is that some of the material which is shown in the photographs which have just been introduced?           A. Yes, sir.

Q. As to the end of the sawmill area?

A. Yes, sir.

Q. Did you find any evidence of redwood molding between the sawmill and the east partition or the dividing partition between the halves of the building?

A. Not to the best of my knowledge.

Q. I will show you a photograph. Do you recognize the contents of that photograph?

A. Yes.

Q. Does that show the area between the sawmill and the partition dividing the two halves of the building?           A. It does, sir.

Q. Is that substantially the condition of that area immediately following the fire? [436]

A. Yes, sir.

Q. In the foreground of that picture there is some lumber there. Is that the same lumber you have referred to in your previous testimony as being at the end of the bunker?           A. Yes, sir.

Mr. Castro: I offer that photograph in evidence as Defendant's Exhibit next in order.

(Testimony of Harold McBeth.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AC.)

Q. (By Mr. Castro): Following this fire did you have any discussion with Hyrum Jensen concerning the care of the property? A. Yes, sir.

Q. Who was present at that discussion?

A. Captain Ritchie, for one man, myself, and if I am not mistaken there was one police officer.

Q. Where did the discussion take place?

A. As I remember it, in front of the building on Third Street.

Q. That is the scene of the fire?

A. Yes, sir.

Q. Would you state what was said at that time and place?

Mr. Hilger: When was it?

Q. (By Mr. Castro): Tell us approximately when that [437] was with relation to the fire.

A. Well, it was in the afternoon right after the fire before 5:00 p.m. I cannot state the hour.

Q. Will you state what was said at that time and place concerning the care of that building and its contents?

A. Yes, sir. I told Mr. Jensen it would be necessary for him to put a watchman on duty to protect his property.

Q. At any time have you told Mr. Jensen that if he would put up signs to keep people out and to board the doors the insurance company would take over the care of the property? A. No, sir.

(Testimony of Harold McBeth.)

Q. Were you present at any discussion between Mr. McMullin and Hyrum Jensen?

A. Yes, I am positive I was.

Q. At that discussion——

Mr. Hilger: When?

Q. (By Mr. Castro): Approximately when did it take place?

A. Immediately preceding the fire when the adjusters were called in.

Q. (By the Court): You mean after?

A. Yes. I am sorry, sir.

Q. (By Mr. Castro): Where did it take place?

A. If I am not mistaken, it took place in front of the building, too. [438]

Q. That is, the scene of the fire?

A. At the scene of the fire.

Q. In that discussion was there any statement by Mr. McMullin or yourself that McMullin and you would take care of the care of the building?

A. No, sir, not to the best of my knowledge.

The Court: Who was McMullin?

Mr. Castro: He was the adjuster who was assigned from the Eureka office, your Honor, of the adjustment bureau.

Q. (By the Court): You would not have anything to do with taking care of the building, anyhow?

A. No, it wasn't our duty.

Q. But there was a conversation between the adjuster of the insurance company——

A. Yes, sir.

(Testimony of Harold McBeth.)

Q. —and the plaintiff? A. Yes, sir.

Q. (By Mr. Castro): At any time after the fire did you tell Hyrum Jensen that it was all right for him to give away any of the property that was left in the building? A. No, sir.

Q. With reference to Harold Dee Jensen, were you acquainted with him? A. Yes, sir.

Q. Following the fire did you have any conversation with [439] Harold Dee Jensen?

Mr. Hilger: I object to that as being hearsay as regards Hyrum.

Mr. Castro: It is admissible against Harold Dee Jensen, your Honor.

Mr. Hilger: It is not binding on Hyrum, your Honor.

The Court: Unless you lay some foundation I would hold that that is hearsay.

Mr. Castro: As to Harold Dee Jensen?

The Court: As to the plaintiff in the case.

Mr. Castro: The third party defendant is Harold Dee Jensen.

The Court: Unless you lay some foundation for your so-called third party claim, I would hold that it is hearsay.

Mr. Castro: Is that your ruling, then, your Honor?

The Court: That is what I said.

Q. (By Mr. Castro): Following the fire did you have any discussion with Harold Dee Jensen in the presence of Hyrum Jensen?

(Testimony of Harold McBeth.)

A. Yes, I am positive we did, relating to names of——

Q. (By Mr. Hilger): When was this discussion, before we go into what was said?

A. Right after the fire, Mr. Hilger, when we were looking for witnesses.

Q. The same day? [440]

A. The same day.

Mr. Hilger: Thank you.

Q. (By Mr. Castro): Was there any discussion at that time relating to the subject of the time Hyrum Jensen left the building or Harold Dee Jensen left the building? A. Yes, sir.

Q. Would you state what the discussion was as regards that subject?

A. As I recall it, in asking Mr. Hyrum Jensen his time of leaving the building, as near as I can recall the statement, he left with his grandson Stevie and one other young chap and went to lunch at approximately 11:40.

Q. Did Harold Dee Jensen state approximately the time he left the building on that occasion?

A. Yes, he stated within the vicinity of between five minutes to 12:00 and five minutes after 12:00.

Q. Immediately following the fire did you make any investigation to determine the point of origin of this fire? A. Yes, sir.

Q. Is that one of your duties in the Fire Prevention Bureau? A. It is, sir.

Q. Did you make any investigation to determine the cause of the fire at that time? A. Yes, sir.

(Testimony of Harold McBeth.)

Q. Was that one of the reasons you took some of these [441] pictures?      A. Yes, sir.

Q. Have you had training in determining the point of origin of a fire?      A. I have, sir.

Q. Have you had training in causes of fire?

A. Yes, sir.

Q. And that has extended over a period of how many years?      A. Fourteen years, sir.

Q. Do you attend schools and meetings concerning those subjects?      A. Yes, sir.

Q. What training do you receive in that regard?

A. We have one yearly course in the southern area at the University of Los Angeles, in the northern area at the University of California at Berkeley in arson and fire investigation procedures.

Q. How long a period do those courses extend?

A. Eight-hour periods for five days.

Q. During the course of each year do you have other instruction?

A. We have quarterly meetings of what is known as the Northern California Division of Fire Prevention Bureaus.

Q. And did you make any investigation to determine where the fire originated in the building?

A. Yes, sir.

The Court: He has already answered that. He said he did.

Q. (By Mr. Castro): What investigation did you make in that respect?

A. Well, in making the investigation you always look——

(Testimony of Harold McBeth.)

Q. (By the Court): That is not the question. What did you do? A. What did I do?

Q. That is right.

A. Is it permissible to point to the area that I started in on?

Q. Yes, that is what he wants to know, what you did.

A. I went into this area here where the deep-seatedness of the burning was, to see if I could find anything that would prove that it was a set fire.

Q. (By Mr. Castro): Will you put an X at that mark. Mark that M-1 on Exhibit A.

At this point, your Honor, I think Exhibit A has only been marked for purposes of identification. I would like to offer it at this time in evidence.

(Defendant's Exhibit A for identification was thereupon received in evidence.)

Q. (By Mr. Castro): What else did you do?

A. I took out pieces of board in this area, dug into the [443] ground underneath the floor in this area, cut out partitions in the floor, I sent pieces to the Criminal Identification Investigation Bureau in Sacramento, who has a laboratory, to determine whether there was particles in there that would cause—add fuel to the fire. I waited for an answer and report back.

Q. What conclusion did you reach as to where the fire originated in the building?

Mr. Hilger: I object to that until we find what he did to find where it originated. Apparently his

(Testimony of Harold McBeth.)

testimony so far was as to cause, what he did to find the cause.

Q. (By Mr. Castro): Did you make any observation of the course of the fire? A. Yes, sir.

Q. How did you make your observation as to the course of the fire?

A. As to the deep-seatedness of the burn in the area adjacent and the way it crawled, the prevailing winds that were in the building at the time.

Mr. Castro: May we mark this room with an SW representing the southwest room, your Honor.

Q. Did you go into the upstairs area of the building to see where the fire had come?

A. Yes, sir.

Q. After doing that did you reach any opinion as to where the fire originated? [444]

A. Yes, sir.

Q. What is your opinion as to where the fire originated?

A. Right in this area here (indicating).

Q. You are indicating in the northern portion of the room marked SW. Would you circle the area that you have reference to?

A. (The witness did as requested.)

Mr. Castro: I will mark that circle M-2.

Q. Would you state the basis of your opinion that the fire originated in that room?

A. Yes.

Q. Will you go ahead and state it?

A. Well, the deep-seatedness of your burn com-

(Testimony of Harold McBeth.)

pletely in this room and the amount of heat that forced it to crawl up into the other room, right up above here, showed the great amount of fire that was in this area here (indicating).

Q. This photograph and Exhibit P show the area where the fire penetrated from the southwest room into the storeroom? A. Yes, sir.

Q. At the point which has been marked H-1. Now, did you take a photograph which indicated the course of the fire towards the east side of the building? A. Yes, sir, I think I have.

Q. May we see that photograph? What does that photograph show?

A. This photograph indicates the stairway that goes up into [445] the upper offices and also the partition between the wall.

Q. Which partition is that? Will you point that partition out? A. Right here (indicating).

Q. That is the partition between the southwest room and the storeroom, and you were facing in what direction when that photograph was taken?

A. I would be standing in this area here taking the picture (indicating).

Q. You were facing in a general easterly direction? A. Yes, sir.

Q. And you were standing at approximately the partition dividing the two halves of the building?

A. Yes, sir.

Mr. Castro: I offer this photograph in evidence at Defendant's Exhibit next in order.

(Testimony of Harold McBeth.)

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AD.)

Q. (By Mr. Castro): You handed me a second photograph. What area does it show?

A. The area particularly above what is written as "Kaiser" right in here (indicating).

Q. Is that a loft area? A. It is. [446]

Q. And that is over in the room where the Kaiser was located? A. Yes, sir.

Q. In what direction was that view taken?

A. That was taken with me standing in this position.

Q. You were standing——

A. Approximately at the head of the stairs.

Q. And you were facing generally north?

A. Generally north.

Q. Is that a true picture of what you saw that afternoon? A. Yes, sir.

Mr. Castro: I offer in evidence as Defendant's Exhibit next in evidence.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AE.)

Q. (By Mr. Castro): Did you find any burning in the room marked "Northeast"? A. No, sir.

Q. Did you find any burning in the room which we have referred to as "Store" except at the point "H-1"?

A. Only right in this area above the office, the partition underneath the floor.

(Testimony of Harold McBeth.)

Q. Did you find any evidence of burning below the wall on any of the floors? [447] A. No.

Q. Did you find any evidence of burning overhead in the area of the room which I am pointing to which has been referred to as an office of Dee Jensen and a closet? A. Yes, sir.

Q. Where did that fire come from that was in that area?

A. It crawled through, it crawled down from the roof and the stairway back like that between partitions of the ceiling.

Q. Was this room which was marked SW completely burned in the sense that the walls and the roof and the ceiling area in there was burned?

A. Yes, sir.

Q. Was there any evidence to indicate that the fire had progressed overhead from the room SW at the south end of that room over the top of the office?

A. Yes, crawled back, back over into this area here, crawled through and underneath the partition which was made, if I am not mistaken, of two-by-eights.

Q. Do you have any photograph of that particular area that we have been referring to as the overhead in the office? A. I have three, sir.

Q. What room do they show that overhead?

A. That shows the office, or the overhead of the office, plasterboard dropping down.

Q. That is the upstairs office? [448]

A. Yes, sir.

(Testimony of Harold McBeth.)

Mr. Castro: I offer it in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AF.)

The Witness: This shows the walls of the office.

Q. (By Mr. Castro): That is the same office?

A. That is the same office.

Mr. Castro: I ask that it be made an exhibit.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AG.)

The Witness: This shows the partitions adjacent over here to the office upstairs.

Q. (By Mr. Castro): Facing in a general northerly direction? A. Yes, sir.

Mr. Castro: I offer it as Defendant's next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AH.)

Q. (By Mr. Castro): I show you a photograph taken on August 10, 1956. [449]

The Court: Mr. Castro, I would say that the case at this point has reached the point where there are so many photographs in evidence that it would take a jury weeks to have testimony read back to them to find out what every photograph of these thirty or forty odd photographs that have been offered in evidence here cover, and many of them are duplicated. I think the case could have been cov-

(Testimony of Harold McBeth.)

ered by just a few photographs that are important. However, you can cover as many as you want. I will give the best instructions I can to the jury at the time the matter goes to them on the subject.

Mr. Castro: This is the only photograph of the area of the closet and downstairs office.

The Court: It may be the only photograph, but the question is the materiality of all the photographs, there being so many of them.

Mr. Castro: We will offer it in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AI.)

Q. (By Mr. Castro): In the debris which you found at the end of the bunker and in the wall area did you find any containers in that debris?

A. Yes, sir.

Q. What container did you find in that debris?

A. I found a gallon can.

Q. Was that an open-top can?

A. An open-top can.

Q. Was that found on top of the debris or was it down in the debris?

A. It was on top of the debris.

The Court: AA I think is the one you are looking for.

Q. (Mr. Castro): You took a specific photograph on that question, did you?

The Court: You offered a photograph in evi-

(Testimony of Harold McBeth.)

dence that showed the diesel engine with a can there. That was AA.

Mr. Castro: That was another photograph.

The Court: I thought that is what he was referring to.

Q. (By Mr. Castro): Will you designate on the diagram the approximate location of the can that you found at the end of the bunker?

A. I would say right in this area here (indicating). This is supposed to be the sawmill. The diesel engine sticks out here. Right in that area here (indicating).

Q. Is that the can which is shown in Exhibit AA? That is one of them?      A. Yes.

Q. Did you find another can in the debris at the end of the [451] bunker?      A. Yes, sir.

Q. Did you take a photograph of that can in position?      A. Yes, sir.

Q. Will you mark the general location of that can?

A. On the opposite side of the diesel engine that sticks out from the sawmill.

Q. Is this the photograph that you took of that can in position?      A. It is, sir.

Mr. Castro: I offer it in evidence as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AJ.)

Q. (By Mr. Castro): Did that can contain anything?

(Testimony of Harold McBeth.)

A. Yes, it contained a rag and odors of diesel fuel in it.

Q. Was that an open-top can?

A. It was, sir.

Q. Did you find any container of fuel in the room marked "Kaiser"?      A. Yes, sir.

Q. What did you find in the room marked "Kaiser"?

A. I found a two-gallon can along the partition of the wall, approximately in this area here. [452]

Q. Will you put an X there. I will mark that M-4. Put an X in the position in which you found the one-gallon can with the rag in it at the end of the bunker.

A. Right there (indicating).

Q. I will mark that with a circle M-5, and the one-gallon can that you said you found in the area of the diesel——

A. If you designate that as the sawmill motor that sticks out, it was right in here.

Q. We will mark that M-6. Was the container that you found in the Kaiser room, the two-gallon container at M-4, was it open or closed?

A. It was closed.

Q. Did you find or did you look at the gas tank of the Kaiser automobile?      A. Yes, sir.

Q. Was the cap on or off the gas tank?

A. The cap was off.

Q. Did you find any containers in the room SW?

A. Yes, sir.

(Testimony of Harold McBeth.)

Q. What containers did you find in the room SW?

A. One 50-gallon drum with gasoline in it and with a pump in it.

Q. Was the pump tightly affixed or had it been loosened? A. It was loosely.

Q. Did you find a five-gallon container any place in the [453] building? A. Yes, sir.

Q. Where did you find the five-gallon container?

A. In the area here (indicating).

Q. Will you mark an X there? Designate that as M-7, representing the five-gallon container. Was it open or closed? A. It was open.

Q. What did it contain?

A. It had odors of diesel fuel in it.

Q. Did you find any other containers in the building with fuel, inflammable fuels with relation to the areas we have been talking about?

A. Yes, sir. There was a workbench in the area in here that had an open-top, five-gallon can in this area, right in here, adjacent to the bench.

Q. Will you mark that with an X. Would you designate where you found this 50-gallon can?

A. (Witness indicating.)

Q. M-9. Did you find any other can or container with inflammables in the building?

A. Yes, sir.

The Court: Counsel, I do not want to be critical, but this is taking an inordinate amount of time. You could ask one question of the witness, "Tell us the cans you found," and he could answer it in one

(Testimony of Harold McBeth.)

question and answer, but you go on [454] each one separately and that is time-consuming. Can't you do it all in one question? I could do it.

Mr. Castro: I would just ask the witness how many cans did you find there and where are they located.

The Court: And he can answer it all at one time.

Q. (By Mr. Castro): If you found any other cans, will you designate each of the other cans that you found?

A. There were cans of mastic, which is inflammable, on the floor here (indicating).

Q. Would you mark an X there, please, and put an M-10 over it?

A. There were a few inflammables of paint over in this area on the shelves and on the steel stands that were in here.

Q. You are indicating in the store part?

A. In the store, yes. There were some piled along the shelving here, and others on steel stands that were in this area here.

Q. Did you find anything with regard to the containers in the storeroom which would indicate to you that they had contributed to the fire?

Mr. Hilger: I will object to that as leading and suggestive. Just ask what he found out about the cans.

The Court: I think we can use our common sense. If you have a fire, and the fire starts going, and there is some inflammable material in it, the inflammable material is [455] going to burn.

(Testimony of Harold McBeth.)

Mr. Castro: That is just the point, in that location.

The Court: It does not take a Philadelphia lawyer to decide that. He has stated there was a quantity of paint and inflammable oils and some gasoline and some oil on the premises at the time.

Q. (By Mr. Castro): Were the paint containers burned up in the storeroom?

A. No, they were not.

Q. Were the other inflammable things in the storeroom burned up?

A. Not all of them, no.

Q. Will you go ahead and designate anything else you wish in relation to inflammables?

A. Well, there was a considerable amount of oil—well, let's say inflammables—that could add fuel to the fire in the area they had been working.

Q. (By the Court): What do you mean by that? Do you mean it was in cans?

A. No, your Honor, it would be through working conditions, running the sawmill and greasing.

Mr. Hilger: Grease and dirt.

Q. (By the Court): Greasing material?

A. Yes, sir. [456]

Q. There is nothing unusual about that, is there?

A. No, sir.

The Court: Why do you take up time on that, then?

Q. (By Mr. Castro): Have you designated each of the items that you deemed unusual in finding out the cause of the fire?

(Testimony of Harold McBeth.)

A. With the exception that I failed to point out one other 50-gallon drum which sat adjacent to the motor of the sawmill.

Q. Are there any other items that you felt had any significance in this fire with regard to inflammables?

The Court: So that I understand what he is talking about, there was merchandise and oil in there, in this building, that was of an inflammable nature. It was part of the stock in trade.

Q. Isn't that right?           A. Right, sir.

The Court: Why do we have to take up time on that? There is nothing wrong about a man——

Mr. Castro: We except to the remarks of the Court in that regard.

The Court: I am just trying to save time. It is taking an inordinate long time to bring out. What apparently you want to bring out is the witness' opinion as to the cause of the fire. Now, why don't you ask him that?

Q. (By Mr. Castro): Will you state your opinion as to [457] the cause of the fire?

A. No, I cannot.

Q. Did you form any opinion at all as to whether the inflammables took part in the origin of the fire?

Mr. Hilger: I object to that. He has already answered he hasn't got an opinion.

The Court: Sustained.

Q. (By Mr. Castro): Did you find any indication in the room marked SW as to whether the

(Testimony of Harold McBeth.)

flammables had been placed on the floor of that room?

Mr. Hilger: I object to that as having been asked and answered and covered.

The Court: He has already testified as to where he saw the various cans of material that was inflammable in the place. I think it has been answered. I will sustain the objection.

Q. (By Mr. Castro): Did you find any indication in the room marked SW of inflammables that were not in containers?

Mr. Hilger: I object to that. He has testified fully as to all the inflammables. By "inflammable" what do you mean, counsel? A piece of wood will burn.

The Court: I will sustain the objection on the ground it is cross-examination of his own witness. The witness has already testified that he has no opinion as to the cause of the fire. [458]

Mr. Castro: I am not asking him as to his opinion as to the cause of the fire, your Honor. I am asking him the question as to whether he found any indication of inflammable fluids on the floor of the room marked "Southwest" which were not in containers.

Mr. Hilger: I am going to object to that as being too indefinite. What is an inflammable? It can be a piece of wood. It can be anything. If it is liquid and not in a container, then it is going to run all over everything and be burned up in the

(Testimony of Harold McBeth.)

fire. What do you mean by an inflammable, counsel?

The Court: I have sustained the objection. I do it on the ground that there has to be an end to an examination at some time. I grant counsel have great leeway and all that, but in view of the witness' testimony that he has no opinion as to the cause of the fire, I think a detailed examination unduly prolongs the matter.

Q. (By Mr. Castro): In the room marked "Southwest" did you find any heating units in that room?

Mr. Hilger: Any what?

Mr. Castro: Heating units.

A. Heating?

Q. Yes. A. No.

Q. Like stoves, heaters, or anything of that kind. [459] A. No, sir.

Q. Did you find any gas lines, natural gas, butane gas, or any other types of gas lines entering the room marked "Southwest"? A. No, sir.

Q. Did you find any indication in the room marked "Southwest" that there was burning right on the floor of the room? A. Yes, sir.

Q. In what area did you find the floor of the room burned? A. In this area right here.

Q. Will you mark that area with a red pencil? Will you also mark it M-11? Did you form any opinion as to the cause of that burning on the floor there? A. Yes, sir.

Q. What was your opinion?

(Testimony of Harold McBeth.)

A. There must have been fuel added to it on account of its burning deeply underneath, more so than on top.

Q. What type of fuel?

A. It should have been a fuel of inflammable nature.

Q. Ordinarily does the floor of a room burn in a fire of this nature?

Mr. Hilger: I am objecting to that as being entirely too indefinite about what ordinarily would happen. If he wants to know what happened in this case——

Mr. Castro: I will withdraw the question.

Q. What is there about that type burning that indicates to [460] you——

Mr. Hilger: I will object to that as leading and suggestive. Ask him what it indicates to him.

Mr. Castro: If you want to ask the question, I will ask it that way.

Mr. Hilger: "What does that indicate to you?"

The Court: He did not finish his question.

Mr. Hilger: If he had been allowed to finish it, the damage would have been done. He would have led and suggested.

The Court: I think this witness can take care of himself.

Q. (By Mr. Castro): What was the significance of the burning that you saw in the floor of that area M-11?

A. I took sawed pieces of boards out of the flooring and also the sill, out of here and under-

(Testimony of Harold McBeth.)

neath. After cutting this out, all the deep-seatedness of the burn which, in testing a fire, the deep-seatedness of a burn, we use the point of a knife, and all of it seemed to be on the underneath area instead of on the top.

Q. Did you reach any conclusions as to how it happened to burn in that manner there?

A. It would have had to have some type of fuel added to it to burn that deeply in that area.

The Court: If there were fuel spilled on the floor that would cause it, wouldn't it? [461]

A. Not necessarily, your Honor, not on top. It would burn on top, consume the fuel on top, and then what was underneath, the first fire would take off on top, namely, and consume the fuel; but the other had gone down through the floor, run around, soaked in there, and would cause excessive burning.

Q. You mean the under side of the floor?

A. Yes, sir.

Q. Was that the ceiling of the room below?

A. No, the ground floor.

Q. You are talking about the ground floor?

A. The ground floor.

Q. What was under the ground floor?

A. Dirt—dirt and two-by-twelve—there is a floor made of two-by-eight, two-by-tens, two-by-sixes, two-by-twelves put on six-by—

Q. Is there room for someone to get between the floor and the dirt?      A. Not very well.

Q. Assuming that someone put some liquid there, how would they do that?

(Testimony of Harold McBeth.)

A. Well, they would watch in the areas where there were cracks in the floor and pour it through the cracks of the floor.

Q. Some of it would get on the top as well, wouldn't it?

A. Yes, but in the area where it is on top, it would have a faster chance to evaporate and burn faster, because it is a [462] proper mixture. It is like your automobile. There is a point in here, if necessary, if you don't have the proper mixture in running your automobile, your car won't run right. It is the same case.

Q. It would take an extraordinary mind, wouldn't it, to figure out if you poured some inflammable liquid down through a crack in the floor——

Mr. Castro: I do not think it would take any extraordinary mind to figure that out. All they have to do is pour it on top of the floor.

The Court: That prompted my question. If it was poured on top of the floor, the top would burn, too.

Mr. Castro: Yes, it would, but it didn't burn as deep as it did underneath.

The Court: All right. Go ahead.

Mr. Castro: I believe those are all the questions I have on direct examination.

Mr. Hilger: May I have Exhibit X through about AJ or something.

#### Cross Examination

Q. (By Mr. Hilger): Is that a true picture of

(Testimony of Harold McBeth.)

the north end of the building right after the fire (handing photograph to witness)?

A. Yes, sir.

Mr. Hilger: I introduce that as Plaintiff's next [463] in order.

(The photograph referred to was thereupon marked Plaintiff's Exhibit 21.)

Q. (By Mr. Hilger): Referring to Defendant's Exhibit Z—— A. Yes, sir.

Q. That is lumber, molding, and ashes from same located in the west part of the building?

A. Yes, sir.

Q. Defendant's Y—that likewise is lumber and ashes from lumber on the west side of the building?

A. Which corner, sir?

Q. In the west half of the building.

A. In the west half of the building?

Q. Yes. A. Yes.

Q. Defendant's X—that is the west wall of the building, isn't it?

A. Yes, sir, facing Third Street.

Q. That shows the southwest wall, or does it not? A. Of that front door.

Q. It does not show this portion here, does it?

A. No, sir.

Q. Except partially in the foreground?

A. Partially in the foreground. [464]

Q. Where you observe the stickers in the ashes?

A. Yes, sir.

Q. I show you Defendant's Exhibit AC. That is more lumber and redwood in the west portion

(Testimony of Harold McBeth.)

of the building, looking south from the north part of the building towards the sawmill?

A. Yes, with the exception of this, Mr. Hilger, which fell down from the roof.

Q. Yes, sir.

Mr. Hilger: May I show Exhibit 21 to the jury at this time, your Honor? Pardon me one moment before I do.

Q. That is lumber lying on the ground there throughout the doorway area, isn't it, leading into the building? A. This is not lumber.

Q. I did not ask you about that.

A. No, but I want to make my statement proper.

Q. I asked you if that was lumber there.

A. Part of that is lumber and part of it doors.

Q. And that is lumber that you can see leading back into the building there, isn't it? It appears to be. A. It appears to be, yes.

Q. I show you Defendant's AG. That is the upstairs office, isn't it? A. Yes, sir.

Q. As it appeared right after the fire?

A. Yes, sir. [465]

Q. Perhaps you could help me find the downstairs office, about the last one produced, Defendant's AI. That is this corner office down here, is it not, on the downstairs? A. Yes.

Q. And the identification tag was put on the bottom right of the picture. Now, then, Mr. McBeth, the prevailing wind on that day was blowing from this direction, wasn't it?

A. The northwest, yes.

(Testimony of Harold McBeth.)

Q. That was the northwest and it was blowing towards this way (indicating). A. Yes.

Q. It would be natural for the fire to be traveling in the direction the wind was traveling, correct?

A. Correct.

Q. And it would be natural for it to be traveling in this direction? A. Yes.

Q. The roof over this area was not burned off, was it? A. Over this area?

Q. Over this area. It did not fall in and collapse as it did over this area?

A. I think you will find, sir, in one of the photographs the area over the top of this is down.

Q. And the entire area over here is down, isn't it? A. No, I don't think so. [466]

Q. Let us look at some pictures. Where are the plaintiff's color photos? Mr. McBeth, you recognize this picture? I am showing you Plaintiff's Exhibit 14. I think that was taken standing over here in probably the southwest corner looking northeast toward the part that is behind the partition. Do you have yourself oriented to that?

A. There is the partition, yes.

Q. You will observe the roof is partially gone, but the lumbers thereof are still in place over the partitioned area. A. Yes.

Q. And you will observe even the roof lumbers are collapsed over this entire area here.

A. Yes, sir.

Q. Do you observe that? A. Yes, sir.

(Testimony of Harold McBeth.)

Q. The heat of the fire would follow the direction of the wind ordinarily, wouldn't it?

A. Yes.

Q. You would ordinarily expect the greatest heat to be on this side? A. Yes, sir.

Q. In fact, it was so hot your men couldn't get in here. They had to come around over to make their entrance? A. No, sir.

Q. Do you think the first hoses came through here (indicating)? [467] A. No, sir.

Q. Were you there when the first hoses went through?

A. No, but in talking to our men——

Q. I don't want to know what you talked to your men about. I want to know if there were not three or four hoses taken in through a hole that they kicked in the wall through here.

A. That I couldn't answer, sir.

Q. The greatest heat of the fire went in this direction? A. Yes, sir.

Q. And yet the roof lumbers were not burned over here at the point where they collapsed?

A. That is right.

Q. But these were over here? A. Yes.

Q. You observed a 50-gallon drum of gasoline in this area? A. Yes, sir.

Q. And that had gasoline in it after the fire, didn't it? A. Yes, sir.

Q. It did not burn? A. Yes, it did.

Q. It did not burn?

A. It did burn. Not completely, though.

(Testimony of Harold McBeth.)

Q. You mean the gasoline just burned partly and quit?      A. When it was extinguished.

Q. Do you have a picture of that can?

A. Yes. You took it away from me.

Q. That 50-gallon drum had a top on it, didn't it, and had a pump on it?

A. It had a pump on it.

Q. There was a closed 50-gallon drum; it wasn't sitting there without a top?      A. No, sir.

Q. And it had a pump in it?

A. Yes, a little hand pump.

Q. That pump had a hose on it?

A. Not a hose; a spout.

Q. A spout?      A. Yes.

Q. And that had gasoline in it after the fire, didn't it?      A. And water.

Q. It had gasoline in it, didn't it?

A. Yes, and water combined.

Q. And the gasoline hadn't burned, had it?

A. Some of it had, yes.

Q. Some of it was still there after the fire?

A. I grant you, sir, but still some of it had burned.

Q. You did not put out the fire in that area, did you?

A. I was working in the area, sir.

Q. I thought you crawled on your hands and knees over here. [469]

A. Mr. Hilger, you must remember I am all through there. It is necessary for me to go every place.

(Testimony of Harold McBeth.)

Q. I thought that was the hottest part of the fire, Mr. McBeth.      A. It was.

Q. So it did not burn the gasoline in that drum?

Mr. Castro: The question has been asked and answered.

The Court: Yes, it has.

Q. (By Mr. Hilger): You say you found a rag in a can over in this direction.      A. Yes, sir.

Q. And the rag was not burned?

A. Yes, it was.

Q. You meant you found the remains of a rag?

A. The remains of a rag.

Q. Was that in the can?      A. Yes, sir.

Mr. Hilger: I think that is all.

### Redirect Examination

Q. (By Mr. Castro): Mr. McBeth, I show you a photograph taken on August 10th. Does that show any portion of the roof of this building?

A. Yes, sir.

Q. What portion of the roof does that show?

A. It shows the west side and the center of the building.

Q. Does that show the roof extending right over the center partition between the two halves of the building?      A. Approximately, yes.

Q. Does that show the area where the roof came through?      A. Yes, sir.

Q. Is that the only area in which the roofing came through the roof as shown in that photograph?

(Testimony of Harold McBeth.)

A. Yes, to the best of my knowledge, it is.

Mr. Castro: I offer that photograph in evidence.

Mr. Hilger: May I see it first, counsel? Pretty poor photograph, but I don't suppose it is objectionable.

Mr. Castro: Let the jury decide whether it is a poor photograph.

(The photograph referred to was received in evidence and marked Defendant's Exhibit AK and passed to the jury.)

Q. (By Mr. Castro): I show you a photograph taken August 10th, 1956. What portion of the roof does that show?

A. That shows the east side, the center of the building towards the front of the office.

Q. Referring to the section to which I am now pointing on the diagram, was that the condition of the oil following the fire? A. Yes, sir. [471]

Mr. Castro: I offer it as Defendant's Exhibit next in order.

(The photograph referred to was thereupon received in evidence and marked Defendant's Exhibit AL and passed to the jury.)

Q. (By Mr. Castro): Since the fire has some of this roof fallen in?

A. Yes, sir, due to windy conditions.

Q. Do you know when the colored photographs were taken that were shown you?

A. The colored ones?

Q. Were you shown them?

Mr. Hilger: I think it was Plaintiff's 14.

(Testimony of Harold McBeth.)

Q. (By Mr. Castro): Was this after the fire and after the wind had blown part of the roof down?

Mr. Hilger: I object to that. He has not stated.

A. That was not directly after the fire, no, sir.

Mr. Castro: May we have the date when these colored photographs were taken, counsel?

Mr. Hilger. Yes. They were taken in August.

Mr. Castro: What year?

Mr. Hilger: 1956, shortly after the proof of loss was filed.

Mr. Castro: Who was the photographer?

Mr. Hilger: David Hoppe of the Eureka newspapers. [472] They were printed in Portland three or four weeks prior to the trial.

Q. (By Mr. Castro): Reference was made to a photo of the upstairs, AG. Does that show the type of a desk in the upstairs office?

A. Yes, it does.

Q. What was on top of that desk when you took the photograph?

A. The only thing I could see was some papers with some burned edges on them.

Q. Was there any debris from the ceiling plasterboard there?

A. Yes, sir, it shows right here in the picture.

Q. Do you know what a ledger book is?

A. Yes, sir.

Q. Was there any evidence of a ledger book on top of that table?

A. To the best of my knowledge there was not.

(Testimony of Harold McBeth.)

Mr. Castro: I believe those are all the questions I have, your Honor.

The Court: Is that all, counsel? I would like to excuse this witness unless you have some more questions.

Mr. Hilger: I would like to look at these two pictures of the upstairs office for a moment.

The Witness: Your Honor, he has some other photos of mine. When he gets through I would like to have them back.

Mr. Hilger: Yes, surely, as soon as I finish here. [473]

#### Recross Examination

Q. (By Mr. Hilger): Are these all the photos that you took, Mr. McBeth?

A. Yes, sir, they were all that I took.

Q. It seems to me I saw another one of the upstairs office yesterday, two or three shots of that.

A. No, there were two. The other one I think you saw, Mr. Hilger, if you will give me permission, I will point it out, showing the partition in the office. Somebody has it in evidence.

Q. I have in mind the one that shows the desk.

A. To prove the point, that is all the photos I have. I have the small ones.

Q. I don't doubt your word, Mr. McBeth. I just wanted to make sure, because I observed something in one of the photos I saw yesterday.

A. Yes, sir, I remember your observation.

Q. That I don't see here at the moment, con-

(Testimony of Harold McBeth.)

cerning a couple of steel loops that would be in a loose binder.

A. I remember your observation. The same photo there. That is the one you saw outside.

Mr. Hilger: I have no further questions of the witness.

The Court: You may be excused. We will take the morning recess now, members of the jury.

(Recess.) [474]

NAT ALLEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and jury. A. Nat Allen.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Allen? A. In Eureka.

Q. Married man, family there?

A. Yes, sir.

Q. And you have lived in that area about how long? A. About three years.

Q. In June, 1956, were you living in Eureka?

A. In 1956.

Q. That is a year ago last June.

A. Yes, sir.

Q. Were you employed at that time?

A. Yes, sir.

Q. Where were you employed?

A. Employed by the George C. Jacobs Company, Eureka.

(Testimony of Nat Allen.)

Q. You are acquainted with the Eureka Lumber Company building? A. Yes, sir. [475]

Q. Where is the George C. Jacobs Company with relation to that building?

A. Well, it was cater-cornered and over a block, corner to corner, actually.

Q. What type of work did you do?

A. I did the sales on building material, hardware, paint, millwork.

Q. How long have you been in that line of work?

A. Oh, roughly eleven or twelve years.

Q. At the present time what is your employment in the City of Eureka.

A. I am employed by Montgomery Ward as an outside building material man.

Q. Have you had experience with lumber?

A. Yes, sir.

Q. With redwood molding? A. Yes, sir.

Q. Fenceboards? A. Yes, sir.

Q. Do you recall a fire which occurred at the Eureka Lumber Company? A. Yes, sir.

Q. Following that fire were you contacted by a Mr. McMullin of the General Adjustment Bureau in the City of Eureka? A. Yes, sir. [476]

Q. Did he request you to do anything with regards to the building?

A. He asked me to take an inventory of building material in the building.

Q. Did you then proceed to take an inventory of the things in the building? A. Yes, sir.

Q. Can you give us the date that you took the

(Testimony of Nat Allen.)

inventory?           A. I took it on 9/30.

Q. 1956?           A. 1956.

The Court: September 30th?

A. Yes, sir.

Q. (By Mr. Castro): Was anybody with you when you took it?           A. No, sir.

Q. Did you reduce that inventory to writing?

A. Yes, sir.

Q. Did you put down the quantity of each item that you found?           A. Yes, sir.

Q. Did you put down the wholesale price for each item that you found?           A. Yes, sir.

Q. Did you recently have handed you a copy of the proof of [477] loss in this case?

A. Yes, sir.

Q. Have you received that proof of loss with regards to the inventory that you took?

A. Yes.

Q. Do you have your written inventory with you?           A. Yes, sir.

Q. Do you have a copy of the proof of loss which I gave you? Did your inventory include the portable sawmill which was in the building?

A. No, sir.

Q. Did your inventory include all items which you saw in the building except the portable sawmill?           A. Except for the machinery.

Q. Would you indicate what you mean by machinery?

• A. Well, the portable sawmill, and I think there was some other motors and things out in that area.

(Testimony of Nat Allen.)

Q. I am referring to stock in trade.

A. Yes, sir.

Q. Did your inventory include the lumber which you saw inside the shed building? A. Yes, sir.

Q. How ordinarily is molding measured?

A. Generally it is measured by molding inch.

Q. Do you find it measured by board feet? [478]

A. Yes, sir, on the inventory.

Q. How did you make your determination as to the material that you found there in the way of molding?

A. Well, I counted it as accurately as I could, what I saw, what I could actually find in the line of moldings, in the line of lumber.

Q. With reference to molding did you measure it in lineal foot or board feet?

A. I measured it in molding—

The Court: Counsel, may I interrupt to ask you a question for the purpose of expedition?

The inventory which you made was of all the material, all the stock which was in this place, irrespective of whether it was damaged or not, or only the material that was not damaged?

A. I took it all.

Q. You inventoried everything that you saw there that was either damaged or undamaged?

A. Yes, sir.

Q. (By Mr. Castro): What did you find there either damaged or undamaged with relation to red-wood molding? The number of feet first.

(Testimony of Nat Allen.)

A. In lineal feet of molding I found roughly twenty—about 2800 lineal feet.

Q. What does that amount to in board feet?

A. In board feet between seven and eight hundred board feet, [479] if you had it in the form of boards.

Q. The proof of loss calls for approximately 66,000 board feet. That would amount to what in lineal feet?

A. Well, your average moldings will run probably out of one by two or one by three, so converting that to board feet, you would have roughly up to a quarter of a million lineal feet or molding inches.

Q. As against the 2800 that you found in damaged and undamaged material? A. Yes.

Q. Did you find some fenceboard?

A. Yes, sir.

Q. Either damaged or undamaged?

A. Yes, sir.

Q. What amount of board feet did you find of fenceboard damaged or undamaged?

A. I put it down as 600 board feet.

The Court: When you refer to damaged lumber what do you mean? Lumber that was damaged by some way in fire or water but was capable of measurement? A. Yes, sir.

Q. I suppose some of it was burned up.

A. The ends might be burned or charred. You know, it was all jumbled up. I just estimated what

(Testimony of Nat Allen.)

it amounted to as closely as I could, what was actually there. [480]

Q. (By Mr. Castro): Did you find any other types of lumber in the building, in the shed?

A. I found a little bit of V-rustic, which is a panel or pattern, siding pattern, about a hundred board feet of it, and I found some one-by-two which might be called batton strips or something of that nature. There was about a hundred feet of that.

Q. Were you able to identify or measure any other types of boards there? A. No, sir.

Q. So I may understand and the jury may understand, this is what is inside the building as distinguished from the exterior of the building?

A. Yes, sir.

Q. You made no estimate on things outside the building? A. No, sir.

Q. Did you find any plyboard?

A. No, sir.

Q. Did you find any pine molding?

A. Yes, sir.

Q. How much pine molding did you find?

A. The pine molding I found was in the back room with the doors—I haven't run it clear out here—300, 600—about 600 feet, it seems.

Q. That is board feet? [481]

A. Lineal feet.

Q. And in board feet that would be about what?

A. About 150 board feet.

Q. Where did you find that pine molding?

(Testimony of Nat Allen.)

A. In the back room where the doors, windows and drains were stored.

Q. What was the condition of the pine molding as to whether it would be usable or saleable?

A. It was pretty dirty. It had been wet, of course. I suppose you could salvage it and use it for a painted mold, if you wanted to paint it, but it wouldn't be very valuable.

Q. Did you find any roofing squares, plastic asphaltic roofing squares? A. Yes.

Q. Where did you find those?

A. There was some in a small storage room up where the mill was, and there were a few bundles in the front room, if I remember right, which had been used evidently for display.

Q. How was that merchandise packed or shipped?

A. Shingles are packed in bundles. Asphalt shingles are packed in bundles, three bundles to the square, and the shingles are laid together lengthways and then wrapped with a paper and a wire binder which ties them together, holds them together.

Q. Do those asphalt shingles packed in that manner burn up so that you can't find track of them in a fire of this type? [482]

A. I don't see how they could completely burn.

Q. Did you look for the metal wiring that is used to bind them? A. Yes, sir.

Q. Did you find any of that in the areas where

(Testimony of Nat Allen.)

you found the material?           A. No, sir.

Q. How many did you find altogether?

A. Of shingles?

Q. Yes, the plastic shingles.

A. There were four squares in the shed and I think there were two or three squares in the window.

Q. The proof of loss called for how many?

A. 200 squares.

Q. With reference to the other items in the proof of loss, did your inventory pretty well agree so far as the quantity of items were concerned?

A. In the store part of it, yes, sir. It was fairly close.

Q. Is there any other respect that your inventory does not agree in quantity other than the ones you have indicated so far?

A. Just small items. I mean I noticed one place they have two packages of a certain water putty, and I had only one or something to that effect. But it didn't amount to much in dollars and cents.

Q. Did you then price out the items which you have? [483]           A. Yes, sir.

Q. What prices did you use?

A. Well, I used wholesale or cost prices, as near as possible. Some of the items I couldn't chase down, but I did the best I could.

Q. With reference to a business operated such as the Eureka Lumber Company or Jacobs for whom you were working, does the retailer buy those things at cost prices or wholesale prices?

(Testimony of Nat Allen.)

A. Yes, sir.

Q. What did your prices total?

A. They totaled up——

Mr. Hilger: Are you going to offer this document in evidence? If so, I am going to object to it.

Mr. Castro: I am trying to expedite it, Your Honor.

Mr. Hilger: His inventory would be the best evidence of what it might total.

The Court: Do you want to offer this? Is there any objection to his offering the inventory?

Mr. Hilger: I have no objection.

Mr. Castro: Certainly. I would be glad to offer it, Your Honor. It consists of eight pages.

The Witness: I didn't count them.

Q. (By Mr. Castro): You marked each of your pages? A. Yes.

Q. Will you check through to be sure you have the entire [484] inventory? A. Yes, sir.

Q. Did you total those eight sheets?

A. Yes, sir.

Q. What was the total? A. \$2,420.30.

Mr. Castro: I offer it in evidence as Defendant's Exhibit next in order.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AM.)

Q. (By Mr. Castro): Does that total of \$2,400 include the lumber that you have related as having found there? A. Yes, sir.

(Testimony of Nat Allen.)

Q. Did you find any evidence of any linoleum tile?      A. No, sir.

Q. With reference to the fence boards that you saw there, did you grade those fence boards?

A. Well, the ones that I could see, I could roughly tell a fair grade on them. It is pretty difficult unless you see them, quite a few of them, but I judge the grade to be about a No. 3.

Q. In dollars and cents what does that mean?

A. Well, No. 3 redwood lumber, which I assume was green, would probably have a value at that time of between, oh, \$60 and \$80 a thousand. [485]

Q. In going through the inventory did you note any items where retail prices were charged rather than wholesale prices?      A. Yes, I noted a few.

Q. Would you read those items off, please?

A. Well, foundation bolts, for instance, were put in at 15 cents each. There were 250 of them. I think I had 230 or something. That is a retail price.

Q. What is the wholesale price?

A. Wholesale was seven or eight, depending on how you buy them.

Q. That is cents?

A. Yes, sir. Pabco roof coating put in at \$1.10 a gallon. That is approximately a good retail price for it. It generally costs around 75, 74.

There was a vent and wall window put in a double unit, put in at \$54. I imagine most manufacturers furnish those at approximately cost to get them on the floor. I imagine it should cost around \$20, \$25.

(Testimony of Nat Allen.)

There was a four-foot metal kitchen cabinet in a sink in for \$145. It could cost—normally it shouldn't be that much. That is the retail price. Most of them retail for around \$100 to \$110 now. So even assuming the higher price it is still too high.

Q. What was the wholesale price, approximately?

A. I would say about \$80 or \$90. [486]

Q. Is there any other item that you noted there?

A. I didn't dig through to get them all one after another, but those are the main ones I noticed.

Q. Did you note an item there, a double sink?

A. I didn't run across that particularly. You aren't referring to that four-foot metal cabinet sink, are you?

Q. I believe there was a price of \$51.

A. Yes, double sink. Yes, you have it for \$45. That is practically a retail price. It should be around not more than thirty.

Q. Does that pretty well cover the items in which you found retail prices? A. Yes, sir.

Mr. Castro: I believe those are all the questions I have on direct examination, Your Honor.

#### Cross Examination

Q. (By Mr. Hilger): Mr. Allen, your inventory includes only the items which you were capable of identifying at the time you took your inventory, is that correct? A. Yes.

Q. Anything that would have been consumed by the fire or pushed around and broken up into bits

(Testimony of Nat Allen.)

and pieces prior to your arrival, of course, you did not count?      A. No, sir.

Q. Your inventory did not cover the welder, did it? [487]      A. No, sir.

Q. It did not cover the electric motor, did it?

A. No, sir.

Q. Or either of them so far as that goes?

A. No, sir.

Q. Nor did it include the portable chainsaw?

A. No.

Q. Or planer heads or knives?      A. No.

Q. Nor did it include the portable sawmill?

A. No, sir.

Mr. Hilger: I think that is all. Thank you.

The Court: Is that all, counsel?

Mr. Castro: Just one question.

### Redirect Examination

Q. (By Mr. Castro): On the list of items which were on the proof of loss under items called plumbing, such as ells, and things of that kind——

A. Yes, sir.

Q. Were those in a usable condition?

A. Yes, they could be used. They would not be worth their full value. There were spots of rust and things like that.

Q. They had not been taken care of at the time you saw them on September 30th?

A. No, sir. [488]

Mr. Castro: Those are all the questions I have.

The Court: Do you have another witness?

Mr. Castro: I had two more scheduled for this morning. They were planning to come by Southwest Airlines. They are not here. They should have gotten in here by quarter to ten.

The Court: They are probably delayed. You have just two more witnesses?

Mr. Castro: I have three local witnesses that I can put on after lunch. They are short witnesses. I have four of them that I can put on after lunch.

The Court: We had better recess then until two o'clock.

It seems fairly obvious we can complete the testimony this afternoon.

Mr. Castro: I have only one witness who cannot be available until Monday morning and who will take possibly fifteen minutes.

The Court: Maybe you might cover that by stipulation possibly.

Mr. Castro: It is in relation to these two motors.

Mr. Hilger: You mean the value?

Mr. Castro: No, that they were owned by Hill & Morton.

The Court: I do not force this on anyone, but why [489] don't you discuss that with counsel? If we complete the evidence today, then on Monday we can start with the argument.

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [489-A]

Afternoon Session—2:00 O'clock P.M.

JOHN R. DRISCOLL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. My name is John R. Driscoll, Jr.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Driscoll?

A. At 916 Union Street, Alameda.

Q. Are you employed by anyone?

A. I am employed by Simpson Redwood Company, 235 Montgomery Street, San Francisco.

Q. In what capacity are you employed?

A. I am regional sales supervisor in the eleven western States.

Q. And do you appear here today as a result of a subpoena being directed to your employer?

A. That is correct.

Q. And that subpoena requested you to produce certain records today?

A. That is correct.

Q. Have you brought those records with you?

A. I have. [490]

Q. May we see them at this time, please. What records have you brought with you?

A. I brought invoices of sales of lumber sold to Hill & Morton, Incorporated, and shipped to Eureka Lumber Company from August 1, 1955, to June 25, 1956, including shipments reflected in in-

(Testimony of John R. Driscoll.)

voices 8741, 9429, 9931, 10693, 10805, 11039, 11064, 12327, 12261, 13018, 13129, which invoices were recorded in the subpoena.

Q. Is the Simpson Lumber Company a successor in interest of the Eureka Redwood Lumber Company?

A. The Simpson Redwood Company acquired the properties of the M. & M. Woodworking Company, which included the Eureka Redwood Lumber Company.

Q. Did you find amongst the sales records any record showing a direct sale from Eureka Redwood Company to the Eureka Lumber Company?

A. I have not perused the invoices, merely brought them here, but at a glance and for your information it might indicate that our invoices were directed to Hill & Morton, Incorporated, and show the Eureka Lumber Company at Eureka, California.

Q. In those invoices which invoices cover redwood molding?

A. It is not indicated at a fast glance or at the invoices that this redwood lumber was shipped as redwood molding. However, redwood lumber, either rough or surfaced, may be purchased as molding stock. We did not invoice it, just glancing through here, as molding stock. [491]

Q. Did you find any reference in your records to a shipment or shipments of kiln-dried molding stock to the Eureka Lumber Company?

A. I will have to glance through these very

(Testimony of John R. Driscoll.)

briefly. Offhand the first invoices noted here indicate green California redwood. On the other hand, there is the one which states California redwood. It does not indicate whether it is air-dried, air-seasoned or green.

Q. The one indicating California redwood is invoice No. 8741.

A. The one I am looking at is 10693.

Q. Of what date?           A. January 9, 1956.

Q. Do you find any other that would indicate to you that there was dried molding shipped?

A. I might say this, with a rapid glance here—these, of course, you can take a double look at—I do not see any that indicates that the stock was dry.

Q. On the invoice for January 9, 1956, how many board feet or lineal feet were involved in that shipment?           A. Board footage, 5,696.

Q. Do you have your office copies of those documents?           A. Yes, I do.

Q. May we have them at this time?

A. Yes, sir. [492]

Q. When you ship out green redwood does anything have to be done to it to be able to use it for molding stock?

A. Well, that is a moot question. I will answer it this way: When we ship green redwood or other to other manufacturers, or anyone for that matter, it could be run to molding green, it could be run to molding air-seasoned or it could be run to molding

(Testimony of John R. Driscoll.)

air-dried. It is considered to be, the kiln-dried stock, in its ultimate use, is molding. Molding is used as kiln-dried ultimately, but through an error or other practices you could run that lumber to a molding pattern in its green state. However, it is not the general practice.

Q. What is the practice in the redwood industry as to storing, that is, in the northern part of the State, as to whether green redwood is stored inside buildings or outside buildings?

A. It would be difficult to speak for the industry as a whole or including smaller operators, but it is considered to be the judicious approach not to put green stock under cover, because generally kiln-dried stock is kept in sheds for obvious reasons. It won't pick up moisture. However, in some instances air-seasoned stock is kept under cover.

Q. When the stock leaves your shipment yard such as that referred to as green redwood in the invoices, is that air-seasoned stock at that time?

A. I might make this statement to clarify. What would be [493] the practice of the Simpson Redwood Company as of compared to the practice——

Q. No, we are interested only in the redwood which was involved in these particular invoices, Mr. Driscoll.

A. It would be difficult for me to say, because this transpired prior to our acquisition of the Eureka Redwood Lumber Company.

Q. Did you produce photostats with these copies of the invoices?           A. I did.

(Testimony of John R. Driscoll.)

Q. Will you let us have the photostats of those invoices?

A. Yes, they are right here (indicating).

Q. On Friday of last week did an accountant by the name of Russell Stearns contact your office concerning these invoices?

A. I believe he did.

Q. Did you give Mr. Russell Stearns photostatic copies of those invoices?

A. I was not involved in the particulars. Another gentleman was. However, I met Mr. Stearns and I personally did not give him any invoices to be photostated, but it was my understanding that they were given to him by another party for that purpose.

Q. Amongst those records did you include—is that a bill of lading or shipping memorandum?

A. Yes, sir, bill of lading—yes.

Q. Do you have those bills of lading or shipping memoranda? [494]

A. It could be. As you know, I didn't do anything but pick up the file indicating the invoices requested, nor was I concerned with the particulars.

The Court: Let us move along, counsel. It has taken fifteen minutes and we haven't gotten anything into the record.

Mr. Castro: We have gotten into the record, Your Honor, there was only 5,696 feet.

The Court: In one shipment.

Mr. Castro: In one shipment in a period of ten months.

(Testimony of John R. Driscoll.)

The Court: Are you offering some documents here?

Mr. Castro: Yes, sir.

The Witness: If you will take a look at these, I think it is indicated "Exception." They are self-explanatory.

Q. (By Mr. Castro): The exception you have indicated being the invoices under date of January 9, 1956? A. Yes.

Mr. Castro: I offer these exhibits in evidence as Defendant's next in order.

The Court: Any objection?

Mr. Hilger: No.

(The documents referred to were thereupon received in evidence and marked Defendant's Exhibit AN.) [495]

Mr. Castro: Those are all the questions I have at this time.

### Cross Examination

Q. (By Mr. Hilger): Mr. Driscoll, I direct your attention to invoice No. 23124. That is kiln-dried redwood.

A. That is correct. That is an invoice that was not noted. It happens to be in the file. I just asked our personnel to give you the invoices.

Q. This is one of the invoices—this invoice you were not requested by the defendant to bring in?

A. That is correct.

Q. But it does happen to be there for 9,750 feet of kiln-dried lumber?

(Testimony of John R. Driscoll.)

Mr. Castro: May we have the date, counsel?

Mr. Hilger: 9/6/56.

Mr. Castro: That is three months after the fire.

Mr. Hilger: All right.

Q. Here is an invoice dated 9/3/55, which is quite a bit prior to the fire, calling for 12,500 feet of certified kiln-dried redwood delivered to Eureka Lumber Company. Were you requested by the defendant to bring that invoice?

A. What is the invoice number?

Q. I would say by looking at it ER40117 or A3651.

A. That would be — there might be — bear in mind this all transpired prior to our acquisition, but looking at it [496] factually——

Q. You have no knowledge——

A. No, this all transpired before. I know nothing. I am only here because of my position in the company.

Q. (By the Court): How did that invoice come into your possession?

A. Your Honor, when we acquired the Eureka Redwood Lumber Company.

Q. You got a subpoena from the defendant to bring some invoices?      A. That is correct.

Q. And you brought those invoices and some others besides?      A. I just asked for the file.

Q. In your file there were other invoices than those that were requested in the subpoena?

A. This particular one——

(Testimony of John R. Driscoll.)

Q. Is that so or not? That is all I am asking.

A. This particular one I am referring to now, Your Honor, is not an invoice. It is an order acknowledgment. It happened to be in the file.

Q. All I am trying to find out is how the documents got there.

A. I don't know. I don't know.

Q. (By Mr. Hilger): It shows on its face "Shipped to Eureka Lumber Company via Byers Truck" on its face, does it not? [497]

A. Of course, that is an order acknowledgment, which is always subject to change.

Q. That is what it shows on its face, however?

A. Correct.

Q. There is nothing in the file to indicate a change, is there?

A. That I couldn't say. I don't know.

Q. Look at the file and see.

A. Well, sir, I only brought along again——

Q. I appreciate your position.

A. I don't know any more about this.

Q. I just want to move it along.

A. I don't know. I can't say anything, because I don't know.

Q. Were you asked to bring invoice No. 1398 dated 4/29/55 calling for 20,714 feet of kiln-dried redwood?      A. No, sir.

Q. Were you asked to bring invoice No. 9252 dated 9/13/55 calling for 12,500 feet of kiln-dried redwood?      A. No, sir.

(Testimony of John R. Driscoll.)

Q. Were you asked to bring invoice ER3116 dated March 7, 1955, covering 7,500 feet of kiln-dried redwood?

A. That figure is not—I just brought along what is in the subpoena.

Q. Yes or no? [498]                      A. No.

Q. No. 7560, dated May 5, 1955, calling for 20,112 feet of kiln-dried redwood.

A. Is there a prefix besides this number?

Q. Some, yes; some not. When there is I have been reading it. This happens to be No. 7560. Were you requested to bring that one?                      A. No.

Q. No. ER3367, dated May 3, 1955, calling for 15,000 feet of kiln-dried redwood.                      A. No.

Q. No. 6861, dated March 10, 1955, calling for 1,850 feet of kiln-dried redwood.                      A. No.

Q. No. 6862, dated March 10, 1955, calling for 3,267 feet of kiln-dried redwood.                      A. No.

Q. Or ER7355, dated July 18, 1955, calling for 2,800 feet of kiln-dried redwood.                      A. No.

Q. You were not asked to bring along any of those invoices nor have you?                      A. No.

Q. You were asked to bring along only certain invoices by the defendant. Was that described to you as being all your [499] invoices or just those certain numbers?

A. In the subpoena I don't know. I don't know the legal terminology. We just brought along the invoices requested.

Q. And they were requested specifically by num-

(Testimony of John R. Driscoll.)

ber and not all invoices?      A. By number.

Mr. Hilger: Thank you. That is all.

### Redirect Examination

Q. (By Mr. Castro): Do you know whether any of these invoices exist that counsel was reading the numbers about?      A. No.

Q. May I see the subpoena?

(A document was handed to Mr. Castro.)

Mr. Castro: At this time I would offer the subpoena in evidence.

The Witness: I might add that the word "ER" appears, by reviewing this, as an order rather than an invoice.

Mr. Castro: May the original be made a part of the record, Your Honor?

The Court: It is part of the record. It is on file.

Mr. Castro: May I read it at this time as to what we asked them to bring.

The Court: You can, but what is the point of it? Are you making some complaint that the witness has not brought all you asked him to bring?

Mr. Castro: No, I am just restricting the examination to show what we asked for in the subpoena. May I read it to the jury?

The Court: That is argumentative. I have asked you a question and you have not answered me. Are you making a point that the witness has not brought all of the documents that you asked him to bring? If you do, then I will direct him to go and get the documents, any other documents that you want.

(Testimony of John R. Driscoll.)

Q. (By Mr. Castro): As far as you know have you brought all documents that the subpoena called for? A. Yes, I have.

Q. In that subpoena you were asked to produce all invoices of sales of lumber sold to Hill & Morton, Inc., and shipped to Eureka Lumber Company from August 1, 1955, to June 25, 1956, including certain specific invoices, is that correct?

A. That is correct. Whatever the subpoena reads, that is what we brought.

Q. You have produced all the invoices that you have records of during that period of time?

A. It would be impossible to say that. I don't know.

Q. So far as you know those are all the records that you have? A. I don't know.

Q. Did you furnish this information on these invoices to your representatives in the City of Eureka about a week ago? [501]

A. I might clarify this situation——

The Court: Please answer.

A. No.

Q. (By Mr. Castro): Are you acquainted with Haley Bertain up there? A. Yes, sir.

Q. Did you furnish that information to Haley Bertain? A. No.

Q. Do you know if anybody in your company did? A. Does it have to be yes or no?

The Court: Yes, it does, if you know.

The Witness: I am not sure. I suspect, but I don't know.

(Testimony of John R. Driscoll.)

The Court: Then you don't know?

The Witness: Sure.

Mr. Castro: Those are all the questions I have.

The Court: Any other questions?

Q. (By Mr. Castro): I would ask you this: If there are any other invoices that you have for the calendar year 1955 to June 25, 1956, involving sales of redwood shipped to Eureka Lumber Company, would you produce that for us? When you go back to the office will you check?

A. I will if we have them or if I can. I don't know I can, as we all understand. I will do it if we have them, sure.

The Court: You see, you got a subpoena. [502]

A. Yes.

Q. It told you to bring all the invoices you had including certain ones that were numbered. You brought all those that were numbered?

A. Correct.

Q. And that is all you did bring?

A. Right. There might be other trivia in the file, but I don't know.

The Court: It is up to counsel. If you want to have the witness bring further invoices, I will ask him to return with other invoices.

Mr. Castro: I will make that request, since it has been indicated we made only a limited request.

The Court: No one is criticizing you because you made the request you made, but when you listed certain numbers, I take it the office down

(Testimony of John R. Driscoll.)

there produced only the invoices that you numbered.

The Witness: That is right.

The Court: Maybe they have others, maybe they have not.

The Witness: Correct. The same with me. I don't know.

The Court: He is your witness and you will be bound by his testimony. Do you want him to go back and bring more invoices if he has them? I will direct him to do that if [503] you wish.

Mr. Castro: Will you do that, your Honor?

The Court: Will you do that for us?

A. I will do the best I can. I don't promise it. Don't hold me. There may be some under a rug some place. I don't know. We moved everything to San Francisco.

Q. (By Mr. Hilger): Mr. Driscoll, in an effort to be helpful here, Haley Bertain informs me he has discovered within the last day or so quite a pile of invoices, the numbers of a few of which I read off to you, in the Eureka office. Would you in complying with the direction that you have just received from the Court make inquiry to obtain those invoices as well?

A. Yes. I want to comply with the Court's wishes, but it is so indefinite, I would like to be requested to look for this invoice or that one. Otherwise I might be coming back with sixteen or twenty and missing four.

(Testimony of John R. Driscoll.)

The Court: Counsel on the other side will give you the list of the number of invoices referred to. Then you can make a search of your file in Eureka or wherever they are and get those invoices.

The Witness: Fine. Be glad to. But I think we should have numbers because it would be easier for the gals.

Mr. Hilger: I will provide you with one, Mr. Driscoll. Thank you.

The Court: Is that all of the witness? [504]

Mr. Castro: Yes. May the witness have that list at this time, your Honor, so he can take it with him?

Mr. Hilger: Surely.

The Witness: I would like to ask a fair question, your Honor. How soon do we have to produce them?

The Court: If they are in Eureka, it would be pretty hard to get them here before Monday.

The Witness: A little difficult, but I think most of them should be down here, though we don't know.

Mr. Hilger: I happen to know these are in Eureka. At least I am so informed by Haley Bertain in the last day or two.

The Witness: Your Honor, I would like to make a simple statement to clarify my situation.

The Court: No, you are liable to get us all in trouble. That is all.

MRS. ELLEN VAN HARPEN

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. My name is Mrs. Ellen Van Harpen.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mrs. Van Harpen? [505]

A. I live in Fortuna, California.

Q. You are married and you have a family there? A. That is right.

Q. Do you do some work apart from your home duties? A. Yes, I do.

Q. What type of work do you do?

A. General office work and bookkeeping.

Q. Were you acquainted with Hyrum Jensen and Harold Dee Jensen in the City of Eureka?

A. Yes.

Q. Did you work for the Eureka Lumber Company in the City of Eureka? A. I did.

Q. Over what period of time did you work there?

A. I started there in July of 1955 and I worked through June 23rd or 25th of the following year.

Q. Do you recall the fire occurring at the Eureka Lumber Company building? A. Yes.

Q. Were you still working on the day of the fire? A. Yes, sir.

Q. Have you had any dispute of any kind with either Hyrum Jensen or Harold Dee Jensen?

(Testimony of Mrs. Ellen Van Harpen.)

A. No.

Q. Have there been any unpaid wages or anything of that [506] nature?

A. Well, I have some wages coming yet, yes.

Q. Have you filed any claim with the Department of Labor of the State of California for them?

A. No, I did not.

Q. I only asked that because it will be raised later on. What were your duties there?

A. I did general office work, bookkeeping, and I handled most of the retail sales, the orders that came in.

Q. Where were you located on the premises?

A. Well, in the front of the building. If you were facing the building it would be in the right-hand corner.

Q. This diagram which is here, Exhibit A, this represents Third Street and this represents Commercial Street.

A. Yes.

Q. The black lines represent the divisions between the various offices.

A. Yes, sir.

Q. This door marked with Roman numeral I represents the front door, and this is the step-up area.

A. Yes.

Q. Was your office located in the general area to which I am pointing in the southeast quarter of the building?

A. Yes.

Q. I will show you Exhibit G, which is a photograph of that [507] area. Is that the area of your office?

A. Yes, it was.

Q. What were the books of account of the

(Testimony of Mrs. Ellen Van Harpen.)

Eureka Lumber Company? By that I mean, can you enumerate what they were?

A. General journal, sales journal, accounts receivable ledger, cash receipts and cash disbursements journal. Some of those were in the same book, but they were separate journals.

Q. And did you have a general ledger?

A. Yes.

Q. Where were those records kept at the Eureka Lumber Company?

A. They were kept on an open shelf under the counter in the office.

Q. Is that counter area a shelf area shown in Exhibit G?

A. Well, yes, the top of the counter shows a small part of the shelves.

Q. Were any of those areas burned in the fire?

A. No, they were not burned.

Q. Was one of your duties the posting of those books? A. Yes.

Q. Did you so far as posting was concerned on the day of the fire—how close would you say you had the books posted? Up to what date?

A. I believe that they were completed through the end of May. Usually the month was ended and we posted at the end of [508] the month.

Q. When you purchased redwood molding did you receive sellers' invoices to show that purchase?

A. We received invoices from the people that we purchased it from, yes.

Q. What did you do with those invoices?

A. Well, they were put into a folder in which

(Testimony of Mrs. Ellen Van Harpen.)

we kept all of the accounts payable, loose invoices, until they were paid, and after they were paid they were filed in the file.

Q. What type of file were they filed in after they were paid?

A. There were three drawers of file, the standard office file.

Q. Was that steel file located in the area of your counters that you referred to?

A. Yes, it was right next to my desk.

Q. On the day of the fire were all the ledger books in your office except the accounts receivable book?

A. Yes.

Q. Where was the accounts receivable book?

A. The accounts receivable book was upstairs in Dee's office, Dee Jensen's office.

Q. Had Dee Jensen taken it up on the day of the fire?

A. I believe—I don't remember if it was taken up that day or the day before. I believe Bobby Burton took it up there. [509]

Q. After you learned of the fire did you return to the Eureka Lumber Company that afternoon?

A. Well, yes. I was just a short distance away and I went down there while it was burning.

Q. Did you remain until after the fire was under control and put out?

A. Yes, it was still burning a little bit, but they were going into the building when I left.

Q. Did you see Dee Jensen there during that time?

A. Yes.

Q. Did you have any discussion with Dee Jen-

(Testimony of Mrs. Ellen Van Harpen.)

sen during that occasion relating to the accounts receivable book?

Mr. Hilger: Objection. Hearsay as to Mr. Hyrum Jensen.

The Court: I will sustain the objection at this time.

Mr. Castro: This will be offered, then, for the limited purpose of being evidence against Harold Dee Jensen.

The Court: I will sustain the objection on the same ground that I sustained the other objection. It is hearsay, and until there is some foundation laid for a conversation with Dee Jensen, I will hold that it is not proper at this time.

Q. (By Mr. Castro): You did have a conversation, did you? A. Yes. [510]

Mr. Castro: I am not asking for the conversation, your Honor.

Q. Did you have a conversation with Dee Jensen? A. Yes.

Q. After that conversation with Dee Jensen, did Dee Jensen enter the building?

A. Yes, he did.

Q. And shortly after that did he return to where you were?

A. Yes, he came out on the street where I was standing.

Q. Did he bring anything out with him?

A. Yes.

Q. What was he carrying?

A. He brought the accounts receivable ledger.

(Testimony of Mrs. Ellen Van Harpen.)

Q. Did he show you the accounts receivable ledger? A. Yes, he showed it to me.

Q. What was the condition of the accounts receivable ledger?

A. Well, the covers were blackened and burned some and the edges of the pages were black, scorched.

Q. So far as the inside of the pages were concerned, did you see that condition?

A. Yes, he opened it a little ways so we could look at it, and the edges of the pages were damaged, but not the center or the inner part.

Q. Were you still able to read the contents of the pages which you looked at at that time? [511]

A. Yes.

Q. And did you take over the accounts receivable book from Dee Jensen at that time?

A. No.

Q. What did he do with it after you saw it there?

A. Well, he went over towards his pickup. I don't know.

Q. From that time on have you seen at any place the accounts receivable book? A. No.

Q. After the fire did you have occasion to go into the office to see whether the other books of account were in the office?

A. Yes, I went back once several days later.

Q. How did you happen to go back several days later?

A. Well, I was going to stop and talk to Mr.

(Testimony of Mrs. Ellen Van Harpen.)

Jensen, and I was naturally curious about the damage and the condition of the things I had left in there. They didn't belong to me. I just went in.

Q. Was any inquiry made of you by Mr. Jensen concerning the other ledger books? A. No.

Q. On this occasion that you went back did you see the other ledger books in your office?

A. Yes.

Q. Where did you see the other ledger books?

A. They were on the shelf under the counter where I had left them.

Q. Could you observe their general condition?

A. Well, there was a lot of dirt and burnt pieces of—things that evidently fell from the ceiling that were scattered around, and some water damage, but the books were all in a pile and they didn't seem to be damaged except possibly a little water damage to the covers. I didn't pick them up. I didn't examine them. They were all piled in one pile there.

Q. Those ledger books are large books, are they? Will you generally describe their outward appearance?

A. They are regular heavy folders, post binders, as we call them.

Q. Following the fire did you see these invoices that you had kept in your steel file from people from whom you had purchased the lumber?

A. No, I didn't touch anything. I just walked in, looked, and walked out again. I didn't open the files or anything.

(Testimony of Mrs. Ellen Van Harpen.)

Q. Did you see any indication that the invoice file had been disturbed?

A. No, everything looked as I had left it.

Q. And during the year's period that you worked, approximately one year that you worked there from the time of the fire, do you know whether any physical inventory was ever taken of the—— [513]

A. No, not to my knowledge, there was never any physical inventory.

Q. During the period of working there did you have occasion to go into what we have referred to as the shed area of the building? That would be the building which would be on the Broadway side of the premises.

A. Yes, occasionally I went in there, not often.

Q. What would take you into that section of the building?

A. Well, often there would be phone calls from Mr. Jensen or Dee, or something like that. There were men working there occasionally.

Q. In your past work, Mrs. Van Harpen, have you done work at a mill? Did you and your husband operate a lumber mill?

A. Yes, we did.

Q. Are you familiar with redwood moldings?

A. Yes.

Q. And redwood fenceboard?

A. Yes.

Q. And things of that kind?

A. Yes.

Q. At any time up to the time of the fire, Mrs. Van Harpen, did you see redwood molding, kiln-dried molding of a volume of approximately 66,000

(Testimony of Mrs. Ellen Van Harpen.)

board feet stored in that shed?      A. Molding?

Q. Yes. [514]      A. No.

Q. Did you see fenceboards in the approximate volume, redwood fenceboards of the approximate volume of 35,000 board feet?

A. No, I didn't see it.

Q. What was the lumber that you had seen in the shed when you went in there?

A. Well, any time I went in there there wasn't any lumber stored in there except some pieces of molding, different patterns, and I am talking about actual molding now — quarter round and different patterns of molding that was piled on the ground there. As I remember, there wasn't any floor in that building, and there were scraps, odds and ends.

Q. At any time did you observe redwood molding stacked from a position between—do you recall the portable sawmill in there?      A. Yes.

Q. Between that portable sawmill and the partition dividing the two portions of the building, extending along that partition to within ten to fifteen feet of the rear of the building?

A. What was the question again?

Q. Did you ever see redwood molding stacked there from four feet to nine feet high in those areas?      A. No, I did not.

Q. Did you ever see redwood molding stacked in the center [515] area of that shed which is designated by the rectangle between X-5, X-3 and X-4?

A. That is approximately the area of the mold-

(Testimony of Mrs. Ellen Van Harpen.)

ing I was telling you about, but it wasn't stacked; it was in a loose pile.

Q. It was in a loose pile? A. Yes.

Q. Did you see molding in any other part of that shed area? A. No, I did not.

Q. Did you see fenceboard in any part of that shed area? A. No, I did not.

Q. Would you, so far as grade was concerned of this molding that you saw piled there, what type of grade was that?

A. Well, as far as I know molding—I wouldn't really know the grade of it—as far as I know molding is more or less one grade.

Q. Can you tell us approximately how big a pile you saw there?

A. Well, it was scattered around. I don't know. I couldn't say.

Q. During the last month before the fire occurred did you receive any shipments of redwood, kiln-dried redwood molding that were stored in the warehouse?

A. They received shipments at times. To my knowledge they were not put in there. I don't know.

Q. With reference to the day of the fire, who was working [516] that day in the office or store section of the building?

A. I was there and Dee Jensen, the only regular employees that were there. Mr. Jensen was out in the yard. He came in the office on occasions.

Q. Did you go out to lunch that day?

A. Yes.

(Testimony of Mrs. Ellen Van Harpen.)

Q. About what time did you go out to lunch?

A. It was about five minutes past twelve.

Q. Who was there in the office when you left to go out to lunch?      A. Dee was there.

Q. Earlier that morning had you had to call Dee from another part of the building?

A. Yes, during the morning a customer came in and I had to ask his advice. I called him from a section that they call the warehouse.

Q. Referring again to the diagram, and to the warehouse area to which I am pointing that has been marked SW and has been marked "Kaiser"—

A. Well, I went into the warehouse section, called, and he came from in back.

Q. When you say in the back—

A. The part you have marked "Kaiser."

Q. And then did he approach you through this doorway?      A. Yes. [517]

Q. At that time did you observe any 50-gallon drum in the area?      A. No.

Q. When you left for lunch, you stated, about five minutes after twelve—      A. Yes.

Q. Where did you go?

A. I went to the Blue Ox Cafe.

Q. That is about how far from this particular location?      A. Just one block.

Q. Did you drive over there?

A. Yes, I did.

Q. When did you learn about a fire taking place at this building?

(Testimony of Mrs. Ellen Van Harpen.)

A. I had sat down and had ordered my lunch, and the fire trucks started going by, but I didn't realize where the fire was for a few minutes until someone told me, and then I went out. I had just started to eat my lunch.

Q. About how long—could you give us an estimate of about how long it was between the time you left there and the time you first heard the fire trucks?

A. I would say about ten minutes.

Q. You were familiar with the banking, were you, that was being carried on for the Eureka Lumber Company?

A. Well, yes, I was taking care of the books. I sometimes [518] made the deposits.

Q. Were you familiar with an account which was opened in the name of Harold Dee Jensen?

A. Well, partly so, yes. I had the checkbook in my desk. Sometimes when he wanted me to draw a check he would have me make it out for him.

Q. Was that account used to pay for lumber which had been sold to the Eureka Lumber Company?      A. At times it was, yes.

Q. Say within two months' time of the fire, were you able to use the account in the name of Harold Dee Jensen to put money into it on behalf of the Eureka Lumber Company?

The Court: Was she able to use the account? What do you mean by that?

Mr. Castro: Did you use the account in the last

(Testimony of Mrs. Ellen Van Harpen.)

two months before the fire to pay any obligations of the Eureka Lumber Company?

The Court: Hasn't that already been testified to?

Mr. Castro: No, it has not, your Honor.

The Court: I think it has. The plaintiff himself spoke about that.

Mr. Castro: We do not have to accept the plaintiff's testimony, your Honor.

The Court: The son had paid out of his own account the cost of merchandise. [519]

Mr. Castro: We are not bound by the plaintiff's testimony on it.

The Court: You want to prove something to the contrary?

Mr. Castro: Yes, your Honor.

A. There were no deposits made. I couldn't state exactly it was two months. It may have been two months, six weeks or something like that.

Q. (By Mr. Castro): There were no deposits made into the Harold Dee Jensen account?

A. No.

Q. How was it that no monies were deposited in during that period of a month to six weeks?

Mr. Hilger: I am going to object to this unless I can have a little chance at voir dire here.

The Court: It is a pretty broad question.

Mr. Hilger: Yes. There has been no establishment that she had all the knowledge concerning this account, that she had the right to withdraw, and that she ordinarily made the deposits or she made all the deposits. There has been no establishment

(Testimony of Mrs. Ellen Van Harpen.)

that there was any connection between that account and the books of account of the Eureka Lumber Company.

Mr. Castro: I will withdraw the question and go further into the foundation.

Mr. Hilger: I object to any more questioning on [520] the account of Harold Dee Jensen until such is established.

Q. (By Mr. Castro): Within a month to six weeks of the fire did you have any knowledge of whether checks which were drawn on the account of Harold Dee Jensen were honored when they were presented to the bank?

Mr. Hilger: I will object to that as being incompetent, irrelevant and immaterial as to what the bank might have done with the checks.

The Court: Sustained. I do not see what that has to do with this case.

Q. (By Mr. Castro): Did you have any knowledge of any checks being held at the bank waiting monies to be deposited in the account of Harold Dee Jensen?

Mr. Hilger: I will object to that likewise as being incompetent, irrelevant and immaterial and not having anything to do with this case.

The Court: So far as I can see that is correct.

Mr. Castro: We are offering this evidence on the basis again of motive, your Honor.

Mr. Hilger: What?

The Court: I will sustain the objection. I can't

(Testimony of Mrs. Ellen Van Harpen.)

see any question of motive involved as yet in this case.

Q. (By Mr. Castro): At the time of this fire was there any accounts due the Lumber Wholesale Company?

Mr. Hilger: Objection. Incompetent, irrelevant [521] and immaterial to any issue in this case at this time.

The Court: I will sustain the objection as to any financial status of the concern on the same ground on which I heretofore ruled in connection with similar questions.

Q. (By Mr. Castro): On the morning of this fire was any creditor of the Eureka Lumber Company at the office concerning the payment of his account?

Mr. Hilger: That is objected to as incompetent, irrelevant and immaterial at this stage of the proceeding; the same line of questioning.

The Court: Sustained. I want to make it clear that I am only ruling on this evidence at this time.

Mr. Castro: Perhaps I do not quite understand what your Honor is saying.

The Court: You can't prove motive of something until you have first brought in the corpus delicti, as it were; because somebody has a creditor or his aunt is sick you can't bring that in as evidence of arson. You first have to have some foundation for it.

Mr. Castro: Well, we have proved here—I would

(Testimony of Mrs. Ellen Van Harpen.)

like to discuss it with your Honor. I would like to discuss the problem in front of the jury.

The Court: I think it is quite clear to me that the testimony is not admissible at this stage of the case.

Mr. Castro: Then I would like to make an offer of [522] proof, because Mrs. Van Harpen is going back to Eureka this evening, your Honor.

The Court: All right. It is a little past 3:00. The jury can go out for its recess now and I will hear your offer of proof.

(The jury left the courtroom and in their absence the following occurred:)

Mr. Castro: Concerning the foundation I would like to state this to the Court: That accepting the testimony of the plaintiff as true and correct, that he had redwood moldings stacked in the areas that he has indicated, that in the center of those areas were found the two cans of inflammables in high-priced molding of \$220,000, there was evidence that in the room where the fire is said to have originated, not only by the opinion of the witness this morning but also by Neil Jensen, who saw the fire in the area, that there was evidence on the flooring of the room that flammable liquids had been placed in the floor area, I think from that evidence the jury can infer or make a finding on circumstantial evidence of arson. We can go one step further and connect Dee with it through his conduct as observed by the witness Musser fleeing the scene. That is the foundation from the arson standpoint.

(Testimony of Mrs. Ellen Van Harpen.)

The Court: Have you any other evidence along that line except what you have already presented which you intend to present? [523]

Mr. Castro: Not along that line. I think I have presented everything I know of at this time.

The Court: On the basis of the evidence that has been presented I would take that issue away from the jury. I say that to you unequivocally because in my opinion there isn't the slightest evidence that would justify the cross-complaint in this case, nor any evidence from which an inference could be drawn. There is only your argument and your statements. There is nothing excepting the question of the amount of redwood. Of course, that goes to the amount of the claim, and on that there is some conflict. That is an issue for the jury to determine.

Mr. Castro: The question of motive, and that element of the case is just as important as on the arson end of it, and they have designated 101,000 board feet of lumber in there.

The Court: That may be a question of the correctness of the claim. You can argue that to the jury.

Mr. Castro: And the financial circumstances concerning their background at the time of the loss is certainly evidence of motive and falsification.

The Court: I can't see anything that would justify submitting that issue to the jury. There is nothing by way of motive that would justify the submission of that to the jury as far as I can see. I have listened to the testimony very briefly. If you

(Testimony of Mrs. Ellen Van Harpen.)

have no more evidence on it, I would instruct the jury [524] to take that issue from the jury, and I might even go further in my instructions to the jury, counsel. I do not think the charge of arson, which is a charge of a felony, can be lightly made by an insurance company against a businessman unless they know what they are doing when they file the charge, and it can't be used as a method of defense to a claim unless there is some substantial evidence from which some inferences can be drawn, not because it is a moral question, that he hasn't got much money, not doing much business, may owe some money, and they have some cans in their place of gasoline or other inflammable material which are used there. Somebody sees a man drive an automobile and he is driving a little fast. Those are not things from which justification can be drawn for the proof of what amounts to a felony. I wish to make myself quite clear to you at this point. That is why I asked the question the other day as to whether there would be any other evidence along that line, because I do not want to prejudge that question, but on the basis of your laying the foundation for the question to this witness, you might just as well know what I think about the evidence on that subject so far.

Mr. Castro: I offer to prove by this witness that the account referred to in the name of Harold Dee Jensen, the deposits into such account have been stopped by the Eureka Lumber Company, because there were outstanding bad checks against the ac-

(Testimony of Mrs. Ellen Van Harpen.)

count, for which there were insufficient funds to cover after [525] they had been issued; that the lumber wholesalers had such checks; that the account in the name of the lumber wholesalers was approximately \$18,000; that on the morning of the fire the Northwestern Pacific representative had been in their office for the collection of a delinquent account, a thousand or in excess of a thousand dollars, which was promised to be paid that afternoon, and there was no cash in either bank account to cover that obligation. Those are the items that I wish to prove and that I believe this witness would testify to.

The Court: I would hold that that is not admissible in proof of the claim made in the course of the defendant's case. It might justify the plaintiff committing suicide, having a holdup, or any of a number of a thousand things, but motive does not prove offense. There might be a motive for the plaintiff in the case to do many things if he was in sore straits, but that does not supply the evidence that is needed to prove a charge of arson. So I will hold that the evidence is incompetent, irrelevant and immaterial at this stage of the case.

Mr. Castro: Those are all the questions I have on the direct examination of the witness, your Honor.

The Court: We will take a brief recess.

(Recess, after which the jury returned to the courtroom and the following proceedings were in their presence:)

(Testimony of Mrs. Ellen Van Harpen.)

Mr. Castro: I have completed the direct examination.

The Court: Any cross? [526]

Mr. Hilger: Yes, your Honor.

### Cross Examination

Q. (By Mr. Hilger): Mrs. Van Harpen, your duties did not require you ordinarily to go into the west portion of the building, did they?

A. The shed.

Q. The shed. A. Not ordinarily.

Q. You stated that there was a pile of molding in through here but you did not know how big it was?

A. I couldn't give you any footage in it, no.

Q. You are familiar, are you not, with the acquisition of a rather sizeable quantity of Anzac material from the Eureka Redwood some time prior to the fire? Do you recall that transaction?

A. They purchased material from Eureka Redwood regularly, but the term "Anzac" is not familiar to me.

Q. You do not know of your own knowledge where that was stored at the time of the fire, do you?

A. As a rule it was stored out in the yard.

Q. But you do not know where it was stored at the time of the fire, do you?

A. Are you talking about the Anzac?

Q. I am talking about the Anzac or any or all of it. A. No. [527]

Mr. Hilger: Thank you.

(Testimony of Mrs. Ellen Van Harpen.)

Redirect Examination

Q. (By Mr. Castro): Had you ever seen any large shipments of molding stored in the shed at any time up to the fire?

Mr. Hilger: I object to the use of the word "large."

Q. (By Mr. Castro): Shipments of 20,000 feet or 30,000 feet?

A. No. The molding that was there, was there when I started working there that I am talking about.

Q. Could you tell us anything about the size of that pile physically?

A. Well, as I said, it was scattered. It was not piled high. It was criss-crossed perhaps three or four deep and covered, I believe, an area twelve by fourteen, maybe larger than that.

Mr. Castro: Twelve by fourteen feet? Those are all the questions I have, your Honor.

Mr. Hilger: That is all.

B. C. WOLFE

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you please state your name to the Court and jury, sir?

A. B. C. Wolfe. [528]

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Wolfe?      A. Eureka.

(Testimony of B. C. Wolfe.)

Q. And you have lived in the area about how long?      A. Ten years.

Q. What is your occupation or business?

A. I am an engineer for a sawmill construction firm and in new and used machinery.

Q. Academically you are a Massachusetts Institute of Technology graduate, are you?

A. That is correct.

Q. You have been in that business about how long?

A. My current position about four years.

Q. How long have you been in the machinery business relating to sawmills?

A. Since 1947.

Q. Following a fire that occurred at the Eureka Lumber yard in the City of Eureka did Mr. McMullin of the General Adjustment Bureau of that city ask you to visit the scene of that fire and look at a portable sawmill?

A. That is correct.

Q. About how long after the fire was it that you went to look at the sawmill?

A. I couldn't be specific as to the date, but I believe it [529] was about three or four days.

Q. At that time did you see a sawmill which was located in the position shown in this photograph Defendant's AC?      A. Yes, that is correct.

Q. At that time was part of the roof down on the saw machine as it is shown in that photograph?

A. No, because I walked around the whole machine at that time.

(Testimony of B. C. Wolfe.)

Q. What is the approximate size of that? First, is that a portable sawmill?

A. In the sense that it can be dismantled and moved it is a portable sawmill, yes.

Q. I show you another photograph. Is that taken showing the front as contrasted with the rear of that sawmill?

A. Yes, this photograph was taken on the street side.

Q. In the testimony there has been testimony to a movable wooden platform that moved with the saw of that sawmill.

A. Well, in normal sawmill construction, including this particular piece, there is no necessity for any moving wooden platform, and there was on this item there.

Q. There wasn't on this item?

A. No, there was no reason for it being there.

Q. There is a platform, however, with this sawmill, is there not?

A. Yes, it is shown on this photograph here.

Q. I show you Exhibit D. Does that show the platform to which you have reference?

A. This platform in here is what is normally referred to as an offbear platform, and the one shown on this photograph is the sawyers platform.

Q. Are you familiar with redwood molding?

A. Not specifically. I know what it is. I know what is is used for.

Q. When you visited the mill there after the fire did you find any evidence of redwood molding

(Testimony of B. C. Wolfe.)

remains on top of the platform or any part of the redwood saw?

A. There was no molding or any other type of merchandise on top of the platform, because I walked all around it and on top of it.

Q. Did you find anything to indicate to you that any part of that sawmill had been completely consumed?

A. No, there wasn't any evidence of anything being consumed. Most sawmill equipment is steel and it doesn't burn very well in a fire.

Q. And so far as the wooden members of that sawmill are concerned, was there any total consumption of any portion of the wooden mill?

A. No, they were slightly charred on the outside, maybe ten per cent.

Q. Did you look at the machinery with the thought of a [531] possibility of repairing the machinery? A. Yes, I did.

Q. Does part of the work which you do include the repair of such machinery?

A. Yes, it does.

Mr. Hilger: I object to this. In connection with this sawmill, salvage does not appear to enter into the valuation——

Mr. Castro: I am not going to ask him a question on the salvage.

Mr. Hilger: If he is not going to ask any question about the value after the fire, then, I will object to the whole business as being pointless.

(Testimony of B. C. Wolfe.)

Mr. Castro: I am asking him whether the cost of the repair of that machinery, which is provided for under the policy——

The Court: I don't quite follow you on that. What is the point of that?

Mr. Castro: The policy provides that you insure to the extent of the actual cash value not exceeding the cost of repair or replacement.

Mr. Hilger: Except in matters where the damaged or lost merchandise has been sold and remains undelivered.

Mr. Castro: There is no such provision.

Mr. Hilger: The policy provides that the [532] measure of value on items which are sold but remain undelivered is the sale price thereof.

Mr. Castro: No, the policy provides in paragraph 3, the building form endorsement, Your Honor, in the event there has been a sale of a particular piece of property and it is still on the premises, the sale price shall constitute the actual cash value wherever the term "actual cash value" is referred to in the policy.

The Court: What is the point here, that there was some limit to the liability of the insurance company on this mill?

Mr. Castro: The point is, the mill was repairable at less than \$7,500.

Mr. Hilger: That would not compensate the insured.

The Court: Then this would become a question

(Testimony of B. C. Wolfe.)

of law or instruction to the jury.

Mr. Castro: Yes, it would, Your Honor.

The Court: If you are right about it, you would have to have some evidence in the record to cover it.

Mr. Castro: That is right.

The Court: If your opponent is right about that, then I can instruct the jury to disregard this evidence.

Mr. Castro: That is correct.

The Court: Then I see no harm in allowing it in. It may go in subject to the ultimate determination of its [533] materiality.

Q. (By Mr. Castro): Did you make any investigation of this sawmill to determine whether or not it was repairable? A. Yes.

Q. Did you reach any conclusions as to whether it could be repaired? A. Yes, it is repairable.

Q. Did you reach any conclusions as to the cost of that repair? A. Yes, I did.

Q. What in your opinion was the cost of the repair of that sawmill?

A. Approximately \$1,700.

Q. Have you been back to look at that sawmill since your first look at it? A. Yes, last week.

Q. Has there been any change in the condition of that sawmill over the period so far as the condition of the mill is concerned, over that period of time?

A. The first time I looked at it it was just through a fire. Now it is completely rusted.

(Testimony of B. C. Wolfe.)

Q. Were any steps taken so far as you could see on any equipment to protect against rust?

A. None whatsoever.

Q. Are there ordinary steps which are recognized in the [534] machinery industry for protecting that type of equipment?

A. Yes, on salvageable machinery they used normally a fish oil base of paint or grease or oil.

Q. Reference has been made that the carriage of the machine was warped. Did you inspect the carriage of the machine?      A. Yes, I did.

Q. What was its condition so far as being repairable, usable, or warped?

A. Well, it is still usable. It would require new bearings, but the frame proper is O.K.

Q. With reference to the tracks on which that saw traverses, were they warped?

A. No, I can't say that they were.

Q. In your work have you become acquainted with the capacity of loaders so far as area for hauling of lumber?

A. In a sense. I have not made any specific study of it.

Q. For instance, if I told you that we were dealing with 66,000 board feet of redwood molding, would you be able to tell us approximately how many freight car loads that would constitute?

A. I could compute it and give you a figure on it.

Q. What approximately would that be, Mr.

(Testimony of B. C. Wolfe.)

Wolfe?           A. You said sixty-six?

Q. 66,000 board feet.

A. Well, a normal truck unit of about eight feet by eight feet by twenty feet would contain approximately 15,000 feet, if [535] we are speaking of board measure as such.

Q. With that in mind, would 66,000 board feet, so far as freight cars are concerned, be two or more freight cars of lumber?

A. If the weight was no factor, you could possibly get that much in two large cars.

Q. What in your opinion would it represent in carloads?           A. Two or better.

Q. In your opinion what would 35,000 board feet of redwood fencing represent in carloads?

A. Probably a car and a quarter, a car and a half possibly, according to the weight of it.

Q. In walking around the sawmill did you walk in this area between the sawmill and the middle partition of the building?           A. Yes.

Q. Did you find any evidence or see any evidence in there of any debris or redwood molding?

A. The only debris I noticed was the charcoal that fell off the timbers around there.

Q. What timbers do you have reference to, Mr. Wolfe?

A. The wall of the building and what charcoal fell off the timbers under the mill proper. There is a space of four or five feet. I didn't measure it. I had no reason to.

(Testimony of B. C. Wolfe.)

Mr. Castro: I believe those are all the questions I have on direct examination, Your Honor. [536]

Cross Examination

Q. (By Mr. Hilger): Mr. Wolfe, you were hired by the defendant to do this work, were you not; in a sense you were paid for it?

A. How do you mean?

Q. M-o-n-e-y.

A. I was invited to testify down here or asked if I would.

Q. You did not answer my question, Mr. Wolfe. You were hired and paid by the defendant to make these studies that you have testified to, weren't you?

A. No, sir, I was not.

Q. What was your arrangement with Mr. McMullin? He is the adjuster, is he not, for the insurance company?

A. He asked me at the time if I would come over and make an appraisal of this burnt machinery.

Q. How much did you get paid for your appraisal?

A. I get paid nothing. If we get a job for it, then we make the money on the rebuilds.

Q. You saw charcoal around on the floor area, that is, charred bits and pieces of the residue of the flames around on the deck or along this wall here, did you not?      A. Yes.

Q. What type of instrument did you use to conduct your tests on this piece of equipment, Mr.

(Testimony of B. C. Wolfe.)

Wolfe? A. You need no instruments. [537]

Q. You just go along, sight along it, and that is it? Is that the way you conduct the test?

A. Well, no. What was the specific question?

Q. I just wanted to know what instruments you used to determine the condition of that sawmill, Mr. Wolfe. I believe you have answered me that you used no instruments.

A. That is right. I am in the business of appraising machinery for repair.

Q. How long did you take to appraise this?

A. Probably thirty minutes.

Mr. Hilger: That is all.

### Redirect Examination

Q. (By Mr. Castro): Is any more time required to look at a sawmill of this size?

A. Well, for the amount of equipment there I spent a little too much time, because there are only three pieces there.

Q. What do the three pieces consist of?

A. One diesel engine, Cummins engine, one carriage of nondescript make, and one feed works, friction feed.

Q. Do you have to take the carriage apart to examine it to determine whether it is repairable or usable?

A. No, sir, I do not. Any of these photographs will show you most of the carriage.

Q. Do you have to take the friction portion apart to determine whether or not it is usable?

(Testimony of B. C. Wolfe.)

A. No, sir.

Q. Do you have to take the diesel motor apart to determine whether it is usable?

A. Yes, sir.

Q. What did you do in that connection?

A. Normally when we appraise a diesel that has been in a fire we check to see if there if there is oil in it.

Q. What is the significance of the oil?

A. Usually when the crankcase is full of oil the damage has not been hot enough to damage the casings.

Q. Did you make that check in this instance?

A. Yes, I did.

Q. What did you find?

A. That the crankcase was full of oil.

Q. Did you find anything else that would indicate to you whether the sawmill had been under any intense heat that would destroy the sawmill?

A. No, I did not. Normally, on diesel engines there are a few aluminum parts, and regardless of what the make of the engine, they normally melt off.

Q. And those parts are all replaceable, are they?

A. That is correct.

Q. And they melt at a far lower degree than the steel portions of that engine? A. Yes. [539]

Mr. Castro: I have no further questions.

#### Recross Examination

Q. (By Mr. Hilger): Those aluminum parts, many of them are right down in the middle of that diesel, aren't they, Mr. Wolfe?

(Testimony of B. C. Wolfe.)

A. No, they are on the outside.

Q. Some of them are on the inside, aren't they?  
How about the babbit around any bearings?

A. If the oil is still in the crankcase, you can't melt the babbit.

Q. That is your opinion at least?

A. That is my knowledge.

Q. How about other aluminum parts that might appear on the insides? How about the brass? How about their melting point compared with aluminum?

A. Slightly higher.

Q. Very slightly, too, isn't it?

A. That is right.

Q. Aluminum is about 1400 and copper is about 1600, is that right?      A. That is correct.

Q. A very slight change in temperature would melt the copper and brass bearing, wouldn't it?

A. Diesels have aluminum bearings normally.

Q. I thought they did not have aluminum inside where you [540] had to go after the bearings.

A. No one has said that yet.

Q. You said they were all outside.

A. You said parts. You said nothing about bearings.

Q. A bearing is not a part?

A. Not external, no.

Q. But it is internal, isn't it?      A. Yes.

Q. You can't run the thing without it, can you?  
Yes or no.

A. Will you repeat that, please?

(Testimony of B. C. Wolfe.)

Q. Can you run a diesel engine without bearings in it?      A. No, you cannot.

Q. You did not look at those bearings, did you?

A. I didn't have to. The crankcase was full of oil.

Q. That is your final answer to everything: "We got oil, why, it is O.K." You made no further checks. Yes or no.      A. No.

Q. Where was the feed works on a rig like this, Mr. Wolfe?

A. It normally sits under the carriage rails.

Q. You would have to do some getting to get under there and examine it, wouldn't you?

A. No, sir, it is in plain sight.

Q. Underneath the rails?

A. That is right, but there is a cutout section for it.

Mr. Hilger: That is all. [541]

Mr. Castro: I have no further questions, your Honor.

#### RICHARD HANNA

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court and jury?      A. Richard Hanna.

#### Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Hanna?

A. In Berkeley, California.

Q. By whom are you employed?

(Testimony of Richard Hanna.)

A. Yellow Manufacturing Acceptance Corporation.

Q. Are you appearing here today as a result of a subpoena being served on your employer?

A. Yes, sir.

Q. That subpoena asked you to bring certain records relating to some trucking equipment being purchased by Hyrum N. Jensen.

A. Yes, sir.

Q. Have you brought those records with you?

A. I have.

Q. In specific, do you have a written contract involving, or which calls for a down payment credit on a portable sawmill? [542]

A. No, sir.

Q. Do you have a written contract on a truck where a sawmill was to be used as a down payment?

A. We have a contract on a truck, sir, but not with a sawmill as a down payment.

Q. What is the date of that contract?

A. January 12, 1956.

Q. May I see that contract?

A. Yes, sir. This is the contract itself.

Q. Do you have the original contract with you?

A. Not with me, no, sir.

Q. This is a photostat of that contract?

A. Yes, sir.

Q. Apparently you made several copies of the photostat? A. Yes, we did.

Q. Did that contract call for a trade-in of the portable sawmill? A. No, sir.

(Testimony of Richard Hanna.)

Q. What is meant under paragraph 2 where it refers to a portable sawmill? Maybe I am using the wrong term.

A. I am sorry. It does. Description of trade-in, portable sawmill.

Q. What is the credit to be received for the portable sawmill?      A. \$4,000. [543]

Q. According to the terms of the contract, what was the total purchase price of the contract?

A. \$13,350.

Q. Did you receive anything else to show that any other credit was to be given except \$4,000 for the portable sawmill?      A. No, sir.

Mr. Castro: I will offer the contract in evidence as Defendant's Exhibit next in order.

The Court: Any objection?

Mr. Hilger: I think I will object to it as being immaterial to show the deal or the arrangement between Dayton Murray Truck Sales and the Eureka Lumber Company. It is a part of the transaction, and insofar as the part is shown, it is in complete agreement with the evidence already in the record, but inasmuch as it is not the best evidence of the complete transaction between the two parties, I will object to it.

The Court: At least——

Mr. Hilger: It is corroborative of the first half of the transaction.

The Court: It shows what it shows so far as the acceptance company was concerned.

Mr. Hilger: But limited only to the entry of the

(Testimony of Richard Hanna.)

financing arrangement into the deal. In my opinion it is incompetent to establish what the actual dealing was between the two dealing parties. [544]

The Court: You say \$3500 credit was given?

Mr. Hilger: No, we say \$4,000 credit was given, and Dayton Murray Truck Sales obligated itself to pay YMAC an additional \$3500, and so far as YMAC goes, that is no concern of theirs. All their contract will show is the original down payment. Who pays the remainder they don't care, just so it is paid.

The Court: There is really no dispute about it, then.

Mr. Castro: They claim there is an additional contract besides this one.

The Court: No, that is not what counsel said. He said the contract between the buyer and the seller was made between the buyer and the seller. So far as the financing is concerned, it showed a down payment of \$4,000.

Mr. Castro: That is what it showed the transaction to be, reflected in the formal contract which was executed by the Dayton Murray Truck Sales.

The Court: I will allow it in if you tell me it is your contention that the transaction with reference to the additional \$3500 was some sort of fake or incorrect matter.

Mr. Castro: It is our contention that this constitutes the entire transaction as represented by this contract.

Mr. Hilger: Then I will object to it as it covers

(Testimony of Richard Hanna.)

[545] only a part of the transaction. There is in evidence already before this Court——

The Court: I do not see that it does any harm if it shows only part of the transaction.

Mr. Hilger: But if counsel is introducing it to try to show that it is the entire contract——

The Court: You can make that point at the time of your argument.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AO.)

Q. (By Mr. Castro): This contract was signed by a representative of the Dayton Murray Truck Sales Company, was it? A. Yes, sir.

Q. And what was his name?

A. W. A. Threlkeld.

Q. After the execution of this contract with Dayton Murray Truck Sales, who was to pay the payments under this contract to your company?

A. The Eureka Lumber Company.

Q. Was the Dayton Murray Sales Company to make any payments——

Mr. Hilger: I will object to that. The contract is the best evidence.

The Court: Yes, that calls for the opinion and conclusion of the witness. [546]

Q. (By Mr. Castro): Assuming this contract had been paid in full, would the Dayton Murray Truck Sales Company have any monies coming out of the payment? A. No, sir.

Mr. Hilger: What is that question again?

(Testimony of Richard Hanna.)

(Question read.)

Mr. Hilger: I object.

The Witness: No, sir.

The Court: Strike the answer. I will sustain the objection. The contract speaks for itself.

Q. (By Mr. Castro): Did you have other conditional sales contracts with H. M. Jensen referring to trucking equipment?

Mr. Hilger: I will object to that as incompetent, irrelevant and immaterial to any issue contained herein. We claim no loss of trucks.

Mr. Castro: I am not offering it for that purpose. I cross-examined the other day to show the interest of Dee Jensen in the particular Eureka Lumber Company. One of the questions which I was permitted to ask and which was answered by the plaintiff was whether or not, following the fire, he had transferred the trucks that were involved that were YMAC to Dee Jensen. He denied that he had.

Mr. Hilger: He said that he had tried to.

Mr. Castro: All right. [547]

Mr. Hilger: But he had not been able to do it.

The Court: I will sustain the objection on the ground it is incompetent, irrelevant and immaterial.

Q. (By Mr. Castro): Do you have any written assignments from Hyrum M. Jensen to Harold Dee Jensen concerning the truck involved in this particular transaction?

Mr. Hilger: Same objection, plus the fact that there is no date on the assignment.

(Testimony of Richard Hanna.)

The Court: There was no what?

Mr. Hilger: No time placed on when the assignments may have become effective. They are incompetent, irrelevant and immaterial anyway.

The Court: Yes. You are getting pretty far afield from the claim on the insurance policy. I will sustain the objection.

Mr. Castro: Mr. Hanna, you are handing me a document which I will ask to be marked for identification.

(The document referred to was thereupon marked Defendant's Exhibit AP for identification.)

Q. (By Mr. Castro): Was this account on this particular truck delinquent at the time, June 25, 1956?

Mr. Hilger: I object to it as incompetent, irrelevant and immaterial and cite that as misconduct.

The Court: Which contract?

Mr. Castro: The one that has been admitted in [548] evidence.

The Court: You are talking about AO?

Mr. Castro: Yes, your Honor.

The Court: Was it delinquent at the time of the fire?

Mr. Castro: Yes, that is what I am asking.

Mr. Hilger: I object to it.

The Court: Sustained. You mean by that, I take it, whether or not there were payments due the finance company that had not been paid. I will sustain the objection if that is the question.

(Testimony of Richard Hanna.)

Q. (By Mr. Castro): Had you received any checks from Hyrum M. Jensen covering any installments due prior to June 25, 1956?

Mr. Hilger: Same objection.

Mr. Castro: (Continuing) Which had not been honored by the bank when they were presented?

Mr. Hilger: Same objection.

The Court: Same ruling. Sustained.

Q. (By Mr. Castro): As of June 25, 1956, were you holding any checks of Hyrum M. Jensen?

Mr. Hilger: Same objection, your Honor.

The Court: Same ruling.

Mr. Hilger: I am going to suggest that further questioning along this line would be misconduct of counsel. [549]

The Court: It is prejudicial, I think. I will sustain the objection. I have already ruled, in the absence of the jury, that those questions are immaterial in the present state of the record.

Mr. Castro: Those are all the questions I have at this time, your Honor. At the close of the session this afternoon may I make an offer of proof concerning these matters I have been asking about?

The Court: Very well. I think the questions indicate the nature of the proof you are seeking to bring in, but you may make it formally if you wish.

Mr. Castro: Thank you.

Mr. Hilger: No questions of this witness.

Mr. Castro: At this time I would like to read from the deposition of Harold Dee Jensen, Jr.

HAROLD DEE JENSEN, JR.

Mr. Castro: Referring to the deposition of Harold Dee Jensen, which was taken on May 11, 1957, if I may, I would like to read the following portions of that deposition. Page 52, line 25:

“Q. Now, after the fire did you prepare any of the proofs of loss which were filed?

“A. I went over it with the accountant, Gene Fox, who is a C.P.A.

“Q. And did you give Gene Fox any figures for [550] the proof of loss?

“A. Yes. We went through the price books and inventories—invoices.

“Q. And did you discuss the proofs of loss with Hyrum Jensen before they were executed?

“A. Yes.

“Q. Did you prepare them for his signature?

“A. I think Mr. Hilger did that. We just made a rough longhand copy of it and took it up to Mr. Hilger's office, and Mr. Hilger's secretary typed it up; and Mr. Jensen went up there and discussed it with him. What he discussed, I don't know; I wasn't there.

“Q. Did you see the proofs of loss after they were prepared?

“A. Yes, I believe I did.

“Q. And where did you see them?

“A. In Mr. Hilger's office.

“Q. Did you review them in there with Hyrum Jensen before he signed them?

“A. I don't think he was with me. I just checked them over.

(Deposition of Harold Dee Jensen, Jr.)

“Q. In Hyrum Jensen’s absence you went up to Hilger’s office?

“A. He may have been with me, I can’t say for sure [551] whether he was or not.

“Q. But in any event, you did check the proofs of loss before they were signed?

“A. That’s right.”

With reference to another subject, page 76, line 12, question by Mr. Castro:

“Q. Did you go into any other portion of the building after you got back from the airport?

“A. Yes. I looked where he put the gas, and I took about a half-gallon out, and my boy has a little car, and I put some of the gas in his car for him.

“Q. About what time was it that you removed the half-gallon from the drum at X-11?

“A. Oh, it was right after we got back from the airport.

“Q. What did you put the half-gallon in?

“A. I don’t remember what kind of a container. I think it was a can or a gallon jug, or something.

“Q. And did the drum have a top to it?

“A. Yes.

“Q. Did you put the top back on the drum, of course?

“A. No, I put a pump in it. It was a regular pump, a self-serving pump. [552]

“Q. And then what did you do with the gasoline you had withdrawn?

“A. I put it in his little car.

(Deposition of Harold Dee Jensen, Jr.)

“Q. Where was the car located?

“A. It was in front of the office.

“Q. In the walk area or the building itself?

“A. It was in the walk area.

“Q. And will you indicate where in the walk area?

“A. I think it was right in front of the window right here (indicating).

“Q. Would you put an X there?

“(Witness marks document.)

“Mr. Castro: We will mark it No. 12.

“Q. Was that a four-wheel automobile?

“A. Yes.

“Q. And was it a gasoline-engine automobile?

“A. Yes.

“Q. Did it operate? “A. Yes.

“Q. Your son was how old?

“A. Oh, I think around eight.

“Q. Then you left him there with the automobile?

“A. There was someone riding with him. I don't remember who it was.

“Q. Did you leave him there with the automobile? [553] “A. Yes.

“Q. And would he drive that automobile?

“A. Yes.

“Q. How big an automobile was it?

“A. Oh, it's just a small one. It's made out of a tank, out of an airplane tank.

“Q. Kind of a scooter?

“A. Well, it is a little larger than a scooter. It

(Deposition of Harold Dee Jensen, Jr.)

has a little Briggs and Stratton motor in it; goes about five miles an hour."

Page 82, line 9:

"Q. Now, after you drew the gasoline from the drum and put it in the boy's automobile, what did you do with the container that you used to carry the gasoline? "A. I don't recall.

"Q. Did you put it back in the building?

"A. Most likely.

"Q. What is your best recollection as to what you did with it?

"A. No; I threw it in the back of his car.

"Q. You left it outside?

"A. Yes; I put it in the back of his car. In fact, I recall now, it was a can that I used, one of these service station cans that has a [554] little spout on it, a red can; and I tossed it in the back of his car.

"Q. Now, at the time of the fire, were there any employees at the Eureka Lumber Company that day? Did you have people employed there that day?

"A. The bookkeeper was there. I don't recall whether there was anyone working in the yard or not.

"Q. Was that Verna Musser or the other one?

"A. Van Harpen. Verna Musser wasn't working at the time.

"Q. Did you have anybody working under you on the day of the fire? "A. No.

"Q. Did Hyrum Jensen have anybody working under him? "A. I don't know.

(Deposition of Harold Dee Jensen, Jr.)

“Q. Were you there the day of the fire?

“A. Yes.

“Q. And you don’t know what employees were working on the day of the fire? “A. No.

“Q. What time did you go to work on that occasion? “A. I don’t recall that. [555]

“Q. Did you go to work before the fire occurred?

“A. Oh, yes. In the morning; I was probably there at 8 o’clock.

“Q. And the fire occurred, as I understand it, sometime around 12 noon, or shortly thereafter? Did you work up until the time of the fire?

“A. I worked up until 12 o’clock, a little after 12. In fact, about 15 minutes after when I left.”

Page 65 of the deposition, line 9:

“Q. Now, were there any doors in the building, so far as the east half of the building was concerned?

“A. This part along here (indicating)?

“Q. No, the east half would be where the office——

“A. Yes. There was one door to the outside, the east side. In fact, this is it right here.

“Mr. Castro: Yes. We will mark that door No. 8.”

Mr. Castro: Do you have the original diagram attached to the deposition, your Honor? No. 8 in the deposition is the door which was referred to as Roman numeral II here (indicating on Defendant’s Exhibit A).

“Q. And how was that door, was it a sliding

(Deposition of Harold Dee Jensen, Jr.)

door?           “A. No, it was a hinged door.

“Q. It was locked from the inside or outside?

“A. Inside. [556]

“Q. What type of lock was used on the inside?

“A. Oh, I don’t recall. There was some kind of a hasp on it. I don’t remember exactly.

“Q. Now, was there a door along the alley at the position marked ‘3’?           “A. Yes.”

That is the door with the Roman numeral marked IV on this diagram, Defendant’s Exhibit A.

“Q. And a door at the position marked ‘2’?

“A. That’s right.”

That corresponds to Roman numeral III.

“Q. And then there was a front door on Third Street at the position marked ‘1’?

“A. That’s right.”

That is Roman numeral I on this diagram.

“Q. And then there was a doorway going upstairs in a position marked ‘6’?

“A. That’s right.

“Q. And alongside of it was a doorway marked No. 5?” (Which is this doorway.)

“Q. Is there some doorway——

“A. That’s right.

“Q. Is there some doorway not marked in there?

“A. No; they’re all in here. This one here is [557] the doorway to the window. I had just about forgot that.

“Q. We can mark that doorway No. 9, perhaps, and then there won’t be any confusion on that.”

“Q. Now, were there any locks on doorway 3?

(Deposition of Harold Dee Jensen, Jr.)

“A. Yes.

“Q. Was that locked from the inside or the outside? “A. Both places.

“Q. And doorway 2, was that a locked door?

“A. I think there's a hasp on the outside, but it was just locked from the outside.

“Q. What type of lock did you have on the inside of that door?

“A. That was just a hasp.

“Q. How was No. 1 door closed, or locked?

“A. It had a key to it.

“Q. And were either doors, 5, 6 or 9 kept locked?

“A. As a rule 5 was kept locked, and when I was out of town, as a rule, 6 was kept locked.

“Q. 6 is the doorway that leads upstairs to the office section? “A. Upstairs, yes.

“Q. Now, was there any doorway in the retail end of the building, or the east side of the building, as I call it? [558]

“A. Well, this one here (indicating).

“Q. So far as outside entrances were concerned?

“A. No, that's all of them.

“Q. Was there any doorway direct from the east half of the building into the west half of the building?

“A. Yes, there is a doorway right here (indicating).

“Q. That would be a door in this general location? “A. Yes.

“Mr. Castro: Marked No. 10.”

(Deposition of Harold Dee Jensen, Jr.)

And it corresponds to Roman numeral V on Defendant's Exhibit A.

"Q. Now, was that door locked?

"A. It was locked with a hasp.

"Q. From the inside or outside?

"A. Inside.

"Q. Now, how many keys did you have to the No. 1 door? "A. Three, I believe.

"Q. Who had those keys?

"A. I had one, my father had one, and the bookkeeper had one."

The Court: How much of this are you going to read, counsel?

Mr. Castro: I am going to show that each of [559] the doors in the building was locked at the time Harold Dee Jensen left the premises at 12:15.

Mr. Hilger: We will stipulate that they were locked. They don't go off and leave a building unlocked.

Mr. Castro: Will you stipulate that they were not forced open by anybody before the fire was discovered?

Mr. Hilger: I won't stipulate to the time of the day except the facts, counsel. I think we have been over this three or four times. The doors were all locked.

The Court: So do I. I do not want to impose upon this jury, but we are going to finish this case some time or other. There is so much repetition. I think we will stay here today until we finish. What

(Deposition of Harold Dee Jensen, Jr.)

is the materiality of reading all this business about those doors again?

Mr. Castro: The materiality of this business is simply this, that the building was locked up, that the fire was discovered in the room which is marked SW, that there was no normal source of the fire in there such as a heater, lighting unit, or anything of that character.

The Court: I did not ask you that. I said what is the materiality of reading all this stuff about the doors when counsel has stipulated with you and it is already in evidence that these doors were locked.

Mr. Castro: If you agree that is the stipulation, I accept it, but I had to read it before I could get the stipulation. [560]

The Court: There is already evidence that you brought out in cross examination to the same effect.

Mr. Castro: I needed the stipulation to tie it down, your Honor, and I am thankful to get it.

Mr. Hilger: You are welcome.

Mr. Castro: With reference to page 44 of the deposition, line 11——

Mr. Hilger: I object to this as being covered under the ruling heretofore given as incompetent, irrelevant and immaterial to the issues here raised.

The Court: How far do you want to read, counsel?

Mr. Castro: I would like to read commencing with line 11 to page 45, line 7.

(Deposition of Harold Dee Jensen, Jr.)

The Court: You want to offer that in connection with the amount of lumber purchased?

Mr. Castro: That is correct.

The Court: I will allow that.

Mr. Hilger: Where are we starting now?

The Court: Line 11, I think he said.

Mr. Hilger: May we begin at line 6, then, as long as we are going to cover this?

Mr. Castro: I shall be glad to read any part you want me to.

“Q. Had business been going along where the [561] Eureka Lumber Company was making money, or was it losing money; or what was the general——

“A. It was making money.

“Q. And about how much was it making?

“A. I think in 1955 it was approximately \$20,000 profit.

“Q. And was there any change in business following the close of '55?

“A. Yes; the lumber business had dropped off considerably, the price had dropped.

“Q. And was that reflected in the Eureka Lumber Company?

“A. Yes, it was reflected in every company, every lumber company.

“Q. Was there any change in the amount of lumber that you were buying in 1956 as a result of that? “A. Yes.

“Q. What did you do with relation to buying lumber in 1956?

“A. You say, what did I do?

(Deposition of Harold Dee Jensen, Jr.)

“Q. Yes.

“A. Well, I just purchased the amount they were selling.

“Q. And was that substantially what you had [562] been purchasing in 1955?

“A. It wasn't as much.

“Q. Percentagewise, how much did you reduce purchases? “A. I couldn't say.

“Q. Approximately? “A. I couldn't say.

“Q. Was there any drop in the amount you were selling? “A. Yes.

“Q. And approximately what did that amount to during that six months?

“A. I couldn't say that, either.

“Q. You cannot give us an approximation on it?

“A. No, I couldn't.”

Mr. Castro: At this time I would like to offer in evidence the invoices referred to in the deposition of H. B. Whittet, which was read by plaintiff earlier in the trial of the case.

The Court: They were not attached to the deposition?

Mr. Hilger: They were not, your Honor. We have no objection to the defendant offering them.

The Court: Mark them in evidence.

(The invoices referred to were thereupon received in evidence and marked Defendant's Exhibit A Q.) [563]

Mr. Castro: At this time I would offer in evidence the deposition of G. R. Abrahamson taken on September 18, 1957.

Mr. Hilger: I will object to this on the ground it is incompetent, irrelevant and immaterial in all respects. It addresses itself to an indebtedness that this gentleman had on the purchase of a home, which indebtedness was subsequently paid.

The Court: I will sustain the objection made by counsel on the same grounds heretofore stated by the Court, and you may mark the deposition for identification if you wish.

(The deposition referred to was thereupon marked Defendant's Exhibit AR for identification.)

Mr. Castro: At this time I will offer in evidence the deposition of Angelo Franceschi, manager of the Crocker-Anglo Bank of Eureka, taken on September 18, 1957.

Mr. Hilger: There are two depositions, one of September 7th and one of September 18th.

The Court: Which one do you offer?

Mr. Castro: The one of September 18th.

Mr. Hilger: I will make the same objection to this deposition that I made to the previous one, your Honor.

The Court: This concerns financial transactions with the bank?

Mr. Hilger: That is all.

The Court: Nothing else is involved? I will [564] sustain the objection on the same ground. The deposition may be marked for identification.

(The deposition referred to was thereupon marked Defendant's Exhibit AS for identification.)

Mr. Castro: Call Mr. Stearns.

The Court: How long is this going to take?

Mr. Castro: Probably a half hour.

The Court: Is this your last witness?

Mr. Castro: I have I think possibly two more witnesses.

The Court: What is this witness going to testify to? The inventory?

Mr. Castro: Yes.

The Court: You are bringing some other witnesses here besides Stearns?

Mr. Castro: I have some on Monday morning, yes.

The Court: Will that relate to the subject matter of the amount of the inventory, too, do you think?

Mr. Castro: Yes, your Honor. One of them will.

The Court: Gentlemen, I took this case here because of the fact that it was stated that counsel were willing to come down here to San Francisco. I was agreeable to taking the case, but I have another case scheduled for I believe Tuesday or Wednesday of next week. I will excuse the jury first and then I will tell you what to do about it afterwards. [565]

(To the jury.) I guess we will have to take the weekend off, members of the jury. Will you come back on Monday morning at ten o'clock, please. The Court will remain in session.

(The following proceedings were had in the absence of the jury:)

The Court: I do not want to be complaining

about this matter, gentlemen, but, as I say, I took this case on the assumption that it was a case that could be disposed of this week, because another important case is scheduled for next week. I note it has not been pre-tried. All of the issues should have been arranged in this case. This case should not have taken more than a couple of days to try. Many of these questions could have been ruled on and determined at pre-trial. I find it has degenerated into a sort of an accounting case, which never should have occurred. Some of these issues should have been referred in this case and the time of the Federal Court not taken up on matters that appear to be somewhat matters of accounting. I am only mentioning that to you because I do not want to keep you here long hours. It is not fair to do that, nor is it fair to the jury. But I would like to know now definitely how much more time this case is going to take. I understood from the Clerk that counsel told him the evidence would be finished today. Now I find you still have many more witnesses that you speak of bringing. How much longer are we [566] going to take in the case? I ask you that not to be captious about it but just because I have other commitments. This case came down from Sacramento and is not on our regular calendar. That is the only reason I am belaboring the point. Can you tell me now with any definiteness how soon the evidence in this case will finish?

Mr. Hilger: I am ready to go to the jury, your Honor. [567]

The Court: That does not answer my question.

Mr. Hilger: I am afraid it will have to be up to Mr. Castro.

The Court: Mr. Castro is the one putting on the defense now. I would like to get some idea.

Mr. Castro: I would like to state, your Honor, that your clerk inquired of me earlier in the week. I thought we would have completed our evidence by Monday noon. I so informed him. As late as today I thought I would have one or two short witnesses for Monday morning. I do not feel I misrepresented the defense in a trial of this case.

The Court: I am not saying that you misrepresented. If I had known we would have to run over to Monday I would have let them go earlier. I do not believe in keeping counsel here long hours despite my remarks that we would sit here to finish the case. Can we have some understanding that we can complete the evidence, say, by noontime on Monday?

Mr. Castro: That would be my understanding, your Honor.

The Court: Then we could perhaps have argument in the case on Monday afternoon and submit the case Tuesday to the jury. Then I know where I am at in respect to further commitments.

Mr. Hilger: I have commitment, too. I begin another trial Tuesday morning in Humboldt County.

The Court: I do not know what we can do about that.

Mr. Hilger: I had certainly hoped we would be through by now, or, rather, that the case could be submitted to the jury Monday afternoon.

The Court: If it is not too late we can do that. I want to discuss the instructions to the jury and the issues to be submitted to the jury. I do not want to submit it to the jury too late. This is going to be a difficult case on the facts for the jury to decide on the amount involved. There are some amounts the Court maybe can give some instruction on, depending, of course, on the law, such as this machine. But there are other items in which there is a divergence in the evidence concerning amount and even to some extent the values involved. There are a large number of photographs in evidence. Has anybody prepared any schedules of the manner in which the amount is arrived at according to the evidence in this case?

Mr. Hilger: I have a schedule that I worked up for my own use.

The Court: So there is something the Court can see in the presentation to the jury and know what the manner of computation is on both sides. The reason I mentioned that is I would not like to submit the case to the jury under those circumstances at some late hour on Monday.

Mr. Hilger: I can arrange with my partner to pick a jury for me on Tuesday. [569]

The Court: I do not see how you can be there Tuesday morning in the present posture of this case. I would not want to submit this case to the jury without giving them some help in segregating and defining the issues that are involved here. Otherwise it would be asking them to make some guess about the case. That is going to take a little time.

Mr. Hilger: I will arrange my schedule accordingly.

The Court: All right. I am sorry I kept you so late. [570]

Monday, September 30, 1957

The Court: Jensen vs. Boston Insurance Company.

Mr. Castro: Ready for the defendant, your Honor.

Mr. Hilger: Ready for the plaintiff, your Honor.

Mr. Castro: We would like to recall Mr. John Driscoll at this time. He is the gentleman from the Eureka Redwood Company, your Honor.

The Court: Very well.

JOHN DRISCOLL, JR.

was recalled as a witness on behalf of the Defendant, and having been previously duly sworn, testified as follows:

Q. (By the Clerk): Please state your name to the Court again for the record.

A. John R. Driscoll, Jr.

Further Direct Examination

Q. (By Mr. Castro): Mr. Driscoll, on Friday afternoon you received a list of numbers from Mr. Hilger while you were here as a witness; do you recall that? A. Yes, sir.

Q. And you were to ascertain whether you could locate those documents or any other documents relating to redwood molding, kiln-dried molding sold and delivered to the Eureka Lumber Company.

(Testimony of John Driscoll, Jr.)

Have you taken any steps to locate those numbers or identify them? [571]

A. Yes, sir. After leaving the court last Friday afternoon we sent a teletype to Mr. Carl S. Walker, who is administrator for the Simpson Redwood Company, requesting that—and if you want me to read this I can and I think it covers everything you requested.

Q. Is the substance of it your request that each of those numbers would be given to you on Friday afternoon?

A. “All invoices of sales of lumber to Eureka Lumber Company by Hill and Morton, Incorporated, and shipped to Eureka Lumber Company from August 1, 1955, to June 25, 1956, including shipments reflected in the following invoice numbers.” And in addition to those numbers, those invoices which we had in court, we requested all the other invoice numbers that were submitted by opposing party.

The Court: I understand you made that request.

The Witness: It was requested that they be mailed airmail special delivery to my attention in San Francisco, and at the time I left for court this morning they had not arrived. However, we were assured personally at the mill level that they would work on this, and it was expected as soon as they can get them in the mill—I am sure that is the only delay—we will have them available, but at this time they have not arrived.

Q. (By Mr. Castro): With reference to the list

(Testimony of John Driscoll, Jr.)

which you received there were certain numbers which were prefaced with an "ER." What does that preface "ER" mean? [572]

A. ER would indicate through examination of some of the papers in this file that it is an order acknowledgment, ER supposedly meaning Eureka Redwood.

Q. And the other numbers would be invoice numbers without a letter preface?

A. That is correct.

Q. What is the record which you have to determine whether an order has been filled and shipped?

A. An invoice.

Q. An invoice record. That is the only record which you would have to show?

A. That is correct.

Q. Reference was made to an invoice involving California Redwood. Do you recall that, in January of 1956?

A. Yes. I am looking at one, a January 9th invoice.

Q. I will show you Exhibit AN. Is that the first invoice?           A. That is correct.

Q. What is the term "294" mean with relation to shipments "MRD"? What does that mean?

A. Where is that?

Q. When it is used on your invoice, what does the term "MRD 294" mean, do you know?

A. Is it on this invoice?

Q. Yes.

(Testimony of John Driscoll, Jr.)

A. Oh, MRD, yes. That would stand for Malarkey Red Diamond, pattern 294. [573]

Q. What is pattern 294?

A. It is a standard redwood pattern. It could be V Rustic. I would want to refer explicitly to a pattern book to describe it. It is a standard pattern.

Q. Is that what you would call a V joint ship lap pattern? A. Offhand I would say yes.

Mr. Castro: Those are all the questions I have of Mr. Driscoll at this time. I would ask that he notify the clerk just as quickly as those come in. If the evidence is not closed we would want him to return.

The Court: Any questions?

Mr. Hilger: No questions.

The Court: Would you notify the clerk as soon as you get the documents?

The Witness: Yes. They should be in the morning mail.

Mr. Castro: Your Honor, Friday when Mr. Wolfe was on the stand I had him identify a photograph of the front end, of the street and of the sawmill, and the clerk called to my attention that I had not asked that it be offered as an exhibit.

The Court: Any objection?

Mr. Hilger: No.

The Court: Mark it.

(Defendant's Exhibit AT for identification was thereupon received in evidence.) [574]

RUSSELL M. STEARNS

was called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Q. (By the Clerk): Will you please state your name to the Court and jury?

A. Russell M. Stearns.

Direct Examination

Q. (By Mr. Castro): Where do you make your home, Mr. Stearns? A. In Piedmont.

Q. What is your profession or business?

A. I am a Certified Public Accountant.

Q. Are you self-employed or do you work for some organization?

A. I work for Peat, Marwick, Mitchell and Company.

Q. With reference to the Eureka Lumber Company, did I request you in September, 1956, to go to Eureka and examine the records of the Eureka Lumber Company? A. Yes.

Q. Following that request did you take a trip to Eureka? A. I did.

Q. On what dates were you in Eureka for that purpose?

A. October 3rd, 4th, and 5th, 1956.

Q. On that occasion did you meet Frederick Hilger, counsel for Hyrum Jensen? [575]

A. Yes.

Q. Did you meet Hyrum Jensen and Harold B. Jensen? A. Yes.

Q. Were you accompanied by anyone from your office to assist in the work? A. Yes.

(Testimony of Russell M. Stearns.)

Q. Who was that? A. Robert Bredal.

Q. Did you examine any records at that time of the Eureka Lumber Company? A. Yes.

Q. Where did you examine the records?

A. Some in Mr. Hilger's office and some in the office of the Eureka Lumber Company.

Q. In the course of that examination did you ascertain whether certain records were not in the group that you were examining? A. Yes.

Q. Did you have a discussion concerning those records in the presence of Mr. Hilger, Mr. D. Jensen and Mr. Hyrum Jensen?

A. In the presence of Mr. Hilger and Mr. D. Jensen.

Q. Where did that discussion take place?

A. Outside the office of the Eureka Lumber Company.

Q. Will you relate that discussion?

A. This discussion was after Mr. Hilger, [576] Mr. Thomas, Mr. Bredal and I searched the Eureka Lumber Company office for all the records we could find. We did not find the purchase record, the sales record or the accounts receivable record. So Mr. Hilger asked H. D. Jensen if he had the accounts receivable record at home. He said he had some records at home, and Mr. Hilger asked him to bring them to his office.

Q. Were those records made available to you thereafter during the time that you were in the city? A. Not on that trip.

(Testimony of Russell M. Stearns.)

Q. Did you also request the production of the general ledger?      A. Yes.

Q. After making the trip in the first part of October, 1956, did you give me a written report as to the documents that you had not found?

A. I did.

Mr. Castro: I would like to offer at this time in evidence a letter of October 19th. First, a letter of September 26, 1956, addressed to the Eureka Lumber Company in care of Frederick L. Hilger.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit AU.)

Q. (By Mr. Castro): This was the letter which introduced you to Mr. Hilger of the Eureka Lumber Company? [577]      A. Yes, it was.

Mr. Castro: At this time I will offer in evidence a letter of October 19, 1956, addressed to the Eureka Lumber Company, Hyrum M. Jensen, Harold B. Jensen, in care of Frederick Hilger.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit AV.)

Q. (By Mr. Castro): Calling your attention to Exhibit AV, would you review the records which are referred to in that exhibit and state whether or not those were the records that you had not seen on your trip to the Eureka Lumber Company?

A. The first is the general ledger for the calendar years 1954, 1955, and 1956. I did not see any general ledger of the Eureka Lumber Company.

(Testimony of Russell M. Stearns.)

The second was an accounts receivable ledger. I did not see any accounts receivable ledger.

Three, combination cash and sales journal. I saw the *cash journal but not the cash journal*.

Four, all vendors' invoices and statements for 1956. I did not see those.

Five, all sales invoices for 1956. I didn't see those.

Six, all correspondence for 1956. I saw very little.

Seven, all payroll records including the entire month of June. I saw part of the payroll records for June. I can't say as to seeing all of them. [578]

Q. What is the significance of these records that you were requesting insofar as establishing an inventory is concerned?

A. It is quite essential in establishing an inventory in the books to have a beginning inventory to which you can add your purchases, both in quantity and in dollar value, and the sales, both in quantities and dollar values, so that you can add the purchases, deduct the sales, and have your quantities and values left at the end of the period.

Q. Is this method of taking a starting inventory from a written record of the insured, adding to it the purchases during the period, and deducting the sales a standard method for determining inventory as of a particular date? A. It is.

Q. From the cash journal which was shown to you were you able to determine the quantity of lumber which was involved in the cash journal entries? A. No, sir.

(Testimony of Russell M. Stearns.)

Q. Were you able to determine whether it was molding, fence board or some other type of lumber?

A. No.

Q. In January of 1957 did you return to the city of Eureka to check on records which were to be made available to you?      A. I did.

Q. What date were you there in January of 1957?      A. January 22nd and 23rd. [579]

Q. Whom did you see on that visit?

A. Mr. Hilger's secretary.

Q. Was that at his office?      A. Yes.

Q. Were any records made available to you on that occasion?

A. The same records that were inspected before plus one ledger on which there was writing on one sheet, which was the last sheet in that book.

Q. Do you have either that ledger sheet or the copy of it?

A. I made a transcript of it.

Q. May I see that at this time?

(A document was handed to Mr. Castro.)

Q. Is this a true and correct copy of the sheet which was exhibited to you on that occasion?

A. On that occasion, yes, sir.

Mr. Castro: I offer it in evidence as Defendant's exhibit next in order.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AW.)

Q. (By Mr. Castro): How many days were you there in January, 1957?      A. Two days.

(Testimony of Russell M. Stearns.)

Q. On that visit were any of the records exhibited to you that you had requested, such as the general invoices, the sellers' invoices or the accounts receivable sales journal? [580]

A. No, sir.

Q. And had you arranged with Mr. Hilger to make that visit to the city of Eureka in January of 1957? A. Yes.

Q. Had you agreed with him as to the date for your visit? A. Yes.

Q. Did you then return a third time in September of this year to examine records which were to be produced for you? A. Yes.

Q. What was the date of your third visit?

A. September the 18th and 19th.

Q. That is approximately a week to ten days ago? A. Yes, sir.

Q. On that occasion were you shown any of the books or invoices which have not been shown you but which you had been seeking before?

A. No, sir.

Q. Now, there are a lot of boxes brought in here. Do you know whether or not those were the boxes which you went through on your last visit up there in September, 1956?

A. They look familiar.

Q. Was that the situation also in January of 1956? A. Yes, sir.

Q. Did you attend the deposition of a man of the Eureka Redwood Company by the name of Haley J. Bertain on the 18th of September? [581]

(Testimony of Russell M. Stearns.)

A. Yes.

Q. In the course of that deposition did Mr. Bertain use a typewritten memorandum to testify concerning sales of redwood? A. He did.

Q. I show you Exhibit M. Is that the document which Mr. Bertain used? A. Yes.

Q. Were you given possession of that document during the deposition? A. Yes.

Q. Would you state what took place and how you happened to have possession?

A. I was given the document in order that I could call on the Simpson Redwood Lumber Company in the Russ Building in San Francisco and obtain copies of the invoices supporting this.

Q. And that was the Thursday before this trial was to start? A. Yes.

Q. And you were to contact the Simpson Lumber Company on the Friday when you were to return? A. Yes.

Q. Did you so contact the Simpson Lumber Company? A. Yes, I did.

Q. Did you receive from Simpson Lumber Company supporting [582] documents for the transactions listed? A. I did.

Q. Would you state the nature of those supporting documents?

A. They are invoices of the Eureka Redwood Lumber Company, most of them supported by shipping purchase orders, where the delivery was made in Eureka. The documents describe the—there is a description of the lumber as to the quantity,

(Testimony of Russell M. Stearns.)

whether or not they are kiln-dried or green, the per thousand price and the amount.

Q. Did you reflect that information on Exhibit M?      A. Yes.

Q. How did you reflect it on Exhibit M?

A. There was one invoice which was omitted from this list which was furnished to me by Simpson Redwood Company which I wrote in in pencil.

Q. What invoice is that?

A. It is dated April 24th, 1956, for 6,000 feet of factory cuts, green, \$120.

Q. Are all the pencil notations on Exhibit M your notations?      A. They are.

Q. Do they refer to each of the supporting documents that you have described?      A. Yes.

Mr. Castro: I would offer this.

The Court: Is this the same list of documents [583] that you have asked the witness Driscoll to bring?

Mr. Castro: No, it is not, your Honor. This is the list which we subpoenaed actually, and this is the information which we were given on September 18th.

Mr. Hilger: Aren't the documents themselves in evidence? Weren't those invoices introduced when Mr. Driscoll testified?

Mr. Castro: There has been some contention that I possibly did not ask for the proper invoices, and I wanted to show that this is what their witness was testifying from, Mr. Bertain, at the time of

(Testimony of Russell M. Stearns.)

his deposition being taken. His deposition is incomplete, your Honor.

Mr. Hilger: The record specifically shows Mr. Bertain was not allowed to testify from any list.

The Court: These invoices have been introduced in evidence.

Mr. Hilger: Certainly they are, and they are the best evidence of the transaction.

The Court: I do not see what or how the witness' notations concerning them would be material.

Mr. Castro: I offered it at the time of the deposition of Mr. Bertain as being read into evidence, your Honor. At that time there was an objection that there were pencil notations on here, and without a foundation as to who made the pencil notations, it would not be admitted into evidence, [584] and that is the reason I have had Mr. Stearns testify as to the penciled notations on Exhibit M.

The Court: The original notations on Exhibit M are covered by the invoices that are marked in evidence, or maybe I misunderstand you. This list that you have in your hands is a list of the exhibits that have already been offered in evidence by Mr. Driscoll?

Mr. Castro: Yes, I believe that is correct, your Honor.

The Court: What is the purpose of this?

Mr. Castro: This is the document which Mr. Bertain was using at that deposition.

Mr. Hilger: It is a document that Mr. Bertain had with him at the deposition, but which he was

(Testimony of Russell M. Stearns.)

not permitted to testify from. He was allowed to refresh his recollection by reference to it, and then he was required to testify from his recollection.

The Court: What does this add to the case?

Mr. Hilger: Nothing.

Mr. Castro: It adds simply this, your Honor, that Mr. Bertain testified that the only items which were shipped to the Eureka Lumber Company were the factory cut items listed, and all items identified other than factory cuts went to customers of the Eureka Lumber Company rather than to the Eureka Lumber Company. [585]

The Court: All you have had this witness do is to testify that he was present at a deposition, and he says the witness at the deposition testified from a document. Counsel says he was not permitted to testify as to the document.

Mr. Castro: I call your Honor's attention to page 14.

The Court: That is disputing the record in the deposition.

Mr. Castro: It is not disputing the record in the deposition.

Mr. Hilger: Where are we now?

The Court: I do not know what the materiality is.

Mr. Castro: Mr. Hilger was questioning him about it on page 14, on this very matter that I brought out to the Court.

The Court: I understand that, but I just do not quite understand what this witness has got to do

(Testimony of Russell M. Stearns.)

with that. He was merely a spectator at the deposition.

Mr. Castro: Yes, but the document was given to him for the specific purpose of bringing it to San Francisco to get the supporting data for each of the items listed in there.

The Court: And that supporting data has already been produced.

Mr. Castro: That is correct. And now, the witness Bertain used this memorandum in his testimony at one point, and [586] page 14, and as I have indicated to the Court, he identifies factory cuts as being the only items which were shipped to the Eureka Lumber Company, the other items being shipped to customers of the Eureka Lumber Company. In other words, possession was not given to Eureka Lumber Company, and without this record, your Honor, it is unintelligible as to what those items are.

The Court: I can see how the record might be introduced in evidence, but I do not see what this witness' testimony has to do with it. He is only an accountant. I am not saying that disparagingly, but he has no first hand knowledge of the transactions themselves.

Mr. Castro: No, I only laid the foundation with him that this was the document which was referred to in the deposition of Mr. Bertain.

Mr. Hilger: Was what?

The Court: We are taking up a lot of time that I think is inconsequential.

(Testimony of Russell M. Stearns.)

Mr. Hilger: It is immaterial, incompetent, hearsay, it is not the document that was presented to Mr. Bertain, it has all sorts of notations over it, and Mr. Bertain was allowed to use the document only to refresh his independent recollection. The invoices reflected on the document are already in evidence. This is not the best evidence of them, and I will stand on those objections. [587]

The Court: If the invoices are already in evidence, then you have the direct evidence concerning which the witness testified.

Mr. Castro: The witness Bertain testified, your Honor, that the items listed here other than factory cuts were shipped to the customers.

The Court: But that testimony is already in the record.

Mr. Hilger: Not from this document but from his recollection.

Mr. Castro: You are referring to the memorandum in the question. There is no doubt about it. Here is what we are dealing with at this time, your Honor.

Mr. Hilger: Beginning at page 4, clear through to pages 8 or 9, when Mr. Bertain finally refreshed his recollection, he referred to it, but then he testified from his recollection.

The Court: This testimony, Mr. Castro, is already in the record.

Mr. Castro: Yes, but it does not mean anything because we do not know what the memorandum is he is testifying from.

(Testimony of Russell M. Stearns.)

The Court: It doesn't make any difference because the invoices themselves are in evidence and they show where the merchandise was shipped.

Mr. Castro: No, not necessarily. [588]

The Court: I understood they did. Where are they? I thought they did. At any rate, this witness' testimony would be hearsay. He had to ask what the facts were.

Mr. Castro: He is the man who sold the lumber.

The Court: I am talking about the witness. The witness knows only what somebody told him.

Mr. Castro: Mr. Stearns' testimony is only for the purpose of identifying the memorandum which was given to him.

The Court: All right. You have established by the witness' testimony that he wrote the notations in pencil on that.

Mr. Castro: That is correct.

The Court: There still remains the question of the admissibility of the document in evidence, which has nothing to do with this witness' testimony. If it is not admissible, there is nothing this witness can say that will make it admissible. He is testifying from hearsay.

Mr. Hilger: It is not the best evidence.

Mr. Castro: He has established that this is the memorandum he used to refresh Bertain's recollection at the time of this deposition.

The Court: I would strike that out because he is not competent. He is not the official reporter. That is not disclosed in the record. An outsider cannot

(Testimony of Russell M. Stearns.)

testify as to how [589] a witness testified in a proceeding that was reported by a reporter, in accordance with the rules.

Mr. Castro: Then it is my fault that it was not identified, your Honor, because it was turned over to the witness at the conclusion of that testimony.

The Court: I do not see any criticism of you involved in it. All I am pointing out is that you cannot introduce a document in evidence merely by reason of the fact that the witness has testified that he received the document and put some writing on it. That does not make it admissible.

Mr. Castro: May I ask him one further question?

Q. Is Exhibit M the document which Mr. Bertain was using in refreshing his memory at the time this deposition was taken on September 18th?

Mr. Hilger: Objection.

A. Yes.

The Court: I will sustain the objection. This witness is not competent to testify to that.

Q. (By Mr. Castro): In reviewing the records of the Redwood Lumber Company did you find that certain moneys were placed in an account for Harold Dee Jensen?

Mr. Hilger: I object to that as incompetent, irrelevant and immaterial at this stage of the proceedings.

Mr. Castro: That is a preliminary question, your Honor. It goes to invoices and that is all. [590]

A. Yes.

(Testimony of Russell M. Stearns.)

The Court: Just a moment. Will you please read that question.

(Question read.)

The Court: For Harold or of Harold?

Q. (By Mr. Castro): Did you find in your review of the books that there was a bank account in the name of Harold Dee Jensen in which moneys from the Eureka Lumber Company records showed deposits in that bank account? A. I did.

Mr. Hilger: I object to it as immaterial at this stage of the proceeding.

The Court: There was some testimony on that already, wasn't there? I think Mr. Jensen testified he put money into it.

Mr. Hilger: Certainly, he testified to that fact and I believe it to be the fact. It is immaterial.

The Court: Mr. Jensen testified he put money into his son's account; am I correct about that?

Mr. Castro: That is correct, your Honor.

The Court: What do you want to ask him about it for?

Mr. Castro: The next question I would ask him is whether he asked for invoices to show purchases of lumber reflecting the amounts of those deposits.

The Court: Whether he asked for? [591]

Mr. Castro: That is correct.

The Court: I will allow it.

Mr. Castro: Thank you.

Q. Do you understand that question, Mr. Stearns?

A. Yes.

Q. Did you see the records of moneys being

(Testimony of Russell M. Stearns.)

transferred from the Eureka Lumber Company to the Harold Dee Jensen account?

The Court: That is not what you asked him. You asked him whether or not he was asked for invoices showing purchases by Harold Dee Jensen. I have allowed that question and he can answer that.

Mr. Castro: Do you understand the question?

A. I did.

Q. Whom did you ask for those invoices?

A. Mr. Hilger.

Q. Have you been given any such invoices up to the present time?           A. No, sir.

Q. Did you find any invoices in the records you saw to support purchases of lumber in the amounts of money that were deposited into the Harold Dee Jensen account?           A. I did not.

Q. During the calendar year 1956, through the time of the fire, did you find any payroll record reflecting that [592] Harold Dee Jensen was on the payroll of the Eureka Lumber Company during the six months before the fire?           A. No, sir.

Q. Did you find any payroll record reflecting whether during the first six months of 1956 there was any withholding tax or social security withholding for Harold Dee Jensen on the payroll?

A. No, sir.

Q. In reviewing the records of the Eureka Lumber Company did you look for the fact as to whether or not there were any overdrafts?           A. I did.

Mr. Hilger: I will object to that.

(Testimony of Russell M. Stearns.)

The Court: Sustained.

Mr. Castro: The following questions, your Honor, go to that question of financial responsibility, so I would have to make an offer of proof because I understand what your Honor's rulings are.

The Court: I take it you want the witness to testified as to what he found to be the financial condition of the plaintiff?

Mr. Castro: That is correct.

The Court: I assume they cover that field. I will sustain an objection to it.

Q. (By Mr. Castro): With reference to Plaintiff's Exhibit 18, a financial statement given to the [593] Anglo California Bank on June 14th, 1956, have you reviewed that financial statement?

A. Yes.

Q. Have you reviewed that financial statement with specific reference to accounts payable?

A. Yes.

Q. Does that exhibit correctly state the accounts payable as of the date in June?

Mr. Hilger: I will object to that. It calls for a conclusion based upon an examination I do not think it was possible for him to make. He has already indicated that he has not had access or the records of 1956 in June have not been available to him for his examination. He has had no information as to the manner of record keeping, whether it is cash, accrual, or what inventory items were considered in transit and what were not. I think all he can tell us is what accounts payable he might

(Testimony of Russell M. Stearns.)

have ascertained actually existed, but as to the correctness of the documents, I think it would call for a conclusion on which he could not possibly have the basis for a valid opinion, even in view of his own testimony that he has been unable to examine the records.

The Court: I am going to curtail the examination as to financial standing. I see no relevancy of it in this case.

Mr. Castro: Again there would be an offer of proof.

The Court: Otherwise we would go into a long [594] examination here that might take a long time as to the correctness of the financial statements that the plaintiff made to the bank. We have no concern with that here.

Mr. Castro: That is in evidence on behalf of the plaintiff over our objection, your Honor, and it goes for the truth of the fact.

The Court: It came in in connection with some testimony, not to show financial standing, but, as I recall—this record has not been written up?

Mr. Castro: No, it has not, your Honor. It came in for all purposes. I did not hear any limitation at the time.

Mr. Hilger: It came in because of the issues raised by counsel in his opening statement, which he has been unable to meet so far on the basis of the evidence.

The Court: If that is the case then I will enter-

(Testimony of Russell M. Stearns.)

tain a motion to strike out the financial statements from the record.

Mr. Hilger: Then we will move to strike it out. It was not a statement rendered to the insurance carrier and they have nothing to do with its correctness one way or the other. It goes to an issue that was raised by counsel in its opening statement but which has not developed in the trial of the matter, and therefore it would be irrelevant.

The Court: The Court admitted them on behalf of the plaintiff.

Mr. Castro: I did not offer them in evidence.

The Court: I say the Court admitted them [595] on behalf of the plaintiff.

Mr. Castro: That is correct.

The Court: In view of the fact that you had made an opening statement in which you had made certain statements, and I ruled, although it was strictly in the sense of rebuttal, I would allow them in as statements on the theory that the Court had control over the order of proof. Since there has been no foundation laid to consider the question of financial condition, on the motion of either side, I would strike the financial statements from the record.

Mr. Hilger: In the present state of the record it relates to no issue raised here and I would move to strike it out since we offered it.

The Court: Both financial statements may be stricken, 17 and 18.

(Testimony of Russell M. Stearns.)

(Thereupon Plaintiff's Exhibits 17 and 18 were withdrawn from evidence.)

Mr. Castro: If the Court please, those are all the questions I have at this time.

The Court: Very well.

### Cross Examination

Q. (By Mr. Hilger): Mr. Stearns, has it not been your experience in your work as a Certified Public Accountant that a physical inventory is [596] much more trustworthy as to accuracy than a derived book inventory? A. Yes.

Q. You have made reference to the fact that certain records were not inspected by you. You have never seen those records, have you, and you were told upon each occasion that Mr. Hyrum Jensen and myself—I think I did most of the talking with you, didn't I? A. Yes.

Q. We did not know where those were except as to, I believe, an accounts receivable ledger and possibly a sales register? A. Yes.

Q. And you were told upon all occasions that all the records, the whereabouts of which we knew, either were already available to you or would be made available, is that not so?

A. That is what you said.

Q. You came up on October 4th for your first examination of various records and noted by correspondence intervening between a period and the second period that you would be up sometime in January, is that correct? A. Yes.

(Testimony of Russell M. Stearns.)

Q. You received a letter from me dated December 4, 1956, did you not?      A. Yes.

Q. And you were told in that letter that [597] Mr. Harold Dee Jensen had been able to make certain reconstructions of the accounts receivable; isn't that the content of that letter?

A. By inference.

Q. And a rather reasonable inference, too, Mr. Stearns, wasn't it, that that is what I meant in that letter?

A. You said in the letter that you had told me that you would obtain from Harold Dee Jensen, if possible, and as soon as possible, the information he had been able to develop by way of the reconstruction of the records referred to.

The next paragraph, "I have in my possession and at your disposal the items referred to and they are available for such inspection at your convenience."

Q. Then you came up in January to inspect them, is that correct?      A. That is right.

Q. On that occasion you went through such of these papers here as you considered relevant, and you found in addition a ledger book with a reconstruction of a list of accounts receivable, is that right?

A. It did not say "Accounts Receivable."

Q. Wouldn't you consider that an accounts receivable sheet based on your experience?

A. It is a list of names with some addresses and some amounts.

(Testimony of Russell M. Stearns.)

Q. And some notations of "Paid," "Paid," "Paid," "Paid." [598] A. Right.

Q. You came up in January, and at that time all of these papers that are here now were again made available to you, in addition to what we had been able to obtain as evidenced by the Exhibit No. AW, to which you have just referred, and you looked all those over again or such as you chose to look at? A. That is right.

Q. You came up again in December, did you not? I am sorry. September of this year?

A. Yes.

Q. That was not by prearrangement with my office, was it? That was upon the occasion of some depositions being taken and you accompanied Mr. Castro? A. That is right.

Q. And you went through this box of material again, particularly this part here. Do you recall asking me to look at this register here (indicating)?

A. Yes.

Q. At my office. You said you found no payroll material showing Harold Dee Jensen on the payroll of the Eureka Lumber Company in your testimony?

A. In—

Mr. Castro: The calendar year 1956. That was the testimony.

Q. (By Mr. Hilger): And did you see these [599] withholding statements covering the earnings and withholdings of Harold Dee Jensen made by Hyrum Jensen doing business as Eureka Lumber Company covering the calendar year 1955?

(Testimony of Russell M. Stearns.)

A. I did.

Q. It is not usual or normal to prepare these W-2 forms until the conclusion of the calendar year, is it, Mr. Stearns? A. No.

Q. And the calendar year 1956 had not been completed when you were marking your examinations up there, had it? A. No.

Q. You have seen a copy of Mr. Harold Dee Jensen's 1955 tax return, haven't you?

Mr. Castro: There is no examination on 1955, your Honor.

Mr. Hilger: This is a Federal Court and we can examine on any point that is relevant.

Mr. Castro: We submit that the direct examination was limited to 1956.

The Court: I think it is proper cross examination. There is some import to the testimony that there was no tax returns or withholding statements made, and I think it is within the realm of proper cross examination. I will allow it.

Q. (By Mr. Hilger): You have seen a photostatic copy of the 1955 tax return of Harold Dee Jensen, have you not? A. Yes. [600]

Q. And it showed nothing but wages from the Eureka Lumber Company with the proper withholding offset against it, isn't that true?

A. True.

Q. It showed not one dime of participation in the net income of the Eureka Lumber Company, isn't that true? A. Yes.

Q. And you have seen copies of the 1955 tax re-

(Testimony of Russell M. Stearns.)

turn of Hyrum Jensen and his wife, have you not?

Yes or no.           A. I saw copies.

Q. Yes.

A. I don't know for sure they were filed.

Mr. Hilger: Mr. Castro, have you been able to obtain from the Internal Revenue Service a copy of the 1955 income tax return requested and which we authorized you to obtain?

Mr. Castro: I do not believe I have. I have given you whatever I obtained.

Mr. Hilger: Let us check the file and see.

Q. I do not see 1954, but you have seen 1955, a copy, have you not?

A. I have seen a copy in the file. I do not know whether it was filed.

Mr. Hilger: There was a copy marked for identification here by the defendant.

The Court: Defendant's Exhibit I. [601]

Q. (By Mr. Hilger): That is a copy that you saw, is it not?           A. I believe so.

Q. And that was found among the records of the Eureka Lumber Company in the course of your examination for Boston Insurance?

A. That is right.

Q. That shows for the calendar year 1955 \$530,-605.33 in sales, doesn't it?           A. Yes.

Q. And it shows a net profit of \$19,732.12?

A. Right.

Q. And not one thin dime of that is allocated as being taxable to anyone but Hyrum D. Jensen, is it?           A. Not here.

(Testimony of Russell M. Stearns.)

Q. You have referred to a list of checks for moneys deposited in the account of Harold Dee Jensen. You referred to such a list of transactions, haven't you, Mr. Stearns?      A. Yes.

Q. Did you ever provide me with that list?

A. No.

Q. How then can you say you asked for invoices covering a list of transactions you did not give me?

A. The cash books showed the record.

Q. The cash book shows the entire transactions for the year? [602]      A. 1956?

Q. Whatever year it purports to record.

A. I asked for the invoices supporting the purchases that were shown paid for to H. D. Jensen, per the cash book, which is right over there.

Q. And you have provided me with no list of transactions to which you had reference?

A. It is right in the cash book.

Q. I ask you if you had provided me with a list.

A. No.

Q. When did you make this demand?

A. In October.

Q. Were you told that you had all available invoices and that any that showed up thereafter would be made available to you at that time?

A. I was.

Mr. Hilger: That is all.

#### Redirect Examination

Q. (By Mr. Castro): Mr. Stearns, are you ac-

(Testimony of Russell M. Stearns.)

quainted with Mr. Frederick Hilger as a Certified Public Accountant?      A. Yes, sir.

Q. And he practiced as a Certified Public Accountant over a period of years, did he not, with the firm of Skinner and Hammond? [603]

A. Yes, sir.

Q. And the cash register that you have referred to is this volume?      A. Yes, sir.

Q. You told him that you wanted the supporting invoices for the transactions with H. D. or Harold Dee Jensen reflected in this cash book?

A. I did.

Mr. Castro: I offer the book in evidence as Defendant's Exhibit next in order.

(The book referred to was thereupon received in evidence and marked Defendant's Exhibit AX.)

Q. (By Mr. Castro): During the calendar year 1955 were you able to ascertain how moneys were paid to Harold Dee Jensen?      A. Yes.

Q. How was the account headed in the book or whatever you saw?

Mr. Hilger: What are we returning to now?

Mr. Castro: The moneys you questioned him about for 1955.

The Witness: As drawings.

Q. (By Mr. Castro): Referring to the 1955 copy of the tax return Exhibit I, does that tax return show the year ending inventory as of December 31, 1955? [604]      A. Yes.

(Testimony of Russell M. Stearns.)

Q. What is the amount of that ending inventory?

Mr. Hilger: We will object to that as immaterial as to the value or the existence of any inventory six and a half or seven months later.

Mr. Castro: That is only the starting point from which the accountant can go.

The Court: It is some evidence. Overruled.

A. \$15,478.11.

Q. (By Mr. Castro): Referring to the financial statement, which is Exhibit 18, formerly in the case, what does it show the inventory was as of June 1, 1956? A. \$28,080.

Q. And that financial statement was executed under what date according to the document?

A. June 14th, 1956.

Mr. Castro: I offer that document in evidence for the specific purpose of referring to the inventory.

The Court: I will allow it for that purpose.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit AY.)

The Court: That was originally 18.

Q. (By Mr. Castro): Now, either from the tax return or from that financial statement were you able to ascertain how much of that inventory was hardware merchandise as distinguished [605] from redwood molding, as distinguished from 2x4's and other material which were in the outside yard?

A. No.

(Testimony of Russell M. Stearns.)

Q. How was the only way that you could get that information? What are you dependent upon for that information?

A. A physical count of the inventory December 31, 1955.

Q. I believe you have already testified you asked for the invoices to support two particular inventories, that is, the inventory as of the end of December, 1955, and as of June, 1956. A. Yes.

Mr. Castro: Those are all the questions I have.

The Court: Anything else of the witness?

Mr. Hilger: Nothing, your Honor.

The Court: That is all, sir. We will take the morning recess.

(Witness excused.)

(Recess.)

Mr. Castro: With reference to the accounts receivable book, your Honor, I would like to read from page 24 of

HAROLD DEE JENSEN'S DEPOSITION  
line 4:

"Q. Who had charge of those books at the time of the fire? "A. Mrs. Van Harpen.

"Q. How long had she been in charge of the books?

"A. I think she had been there about a year, as near as I remember. [606]

"Q. You say the accounts receivable book was upstairs at the time of the fire?

"A. Yes, for the retail.

(Deposition of Harold Dee Jensen.)

“Q. Had you seen it upstairs that morning?

“A. Yes.

“Q. Had you brought it upstairs?

“A. Yes, I took it up there.

“Q. And where did you see it upstairs?

“A. It was on my desk.

“Q. Did you see it after the fire?

“A. Yes.

“Q. Where did you see it?

“A. Still on my desk.

“Q. And did you remove it?                    “A. Yes.

“Q. Where did you take it?

“A. I don’t recall exactly. We went through it and reconstructed as much as possible out of it.

“Q. What did you do with that book?

“A. It was given to Mr. Hilger, and what was this other fellow’s name?

“Mr. Hilger: I believe you are in error there.

“Mr. Castro: Let the witness testify from his recollection, counsel. [607]

“Mr. Hilger: Well, he asked me a question.

“Mr. Castro: He asked you a name. You can either give him a name or tell you don’t know. You don’t have to advise him of something else.

“The Witness: I don’t recall exactly on it.

“Q. (By Mr. Castro): Where did you find the accounts receivable book after the fire?

“A. On my desk in the upper office.

“Q. Was it open or closed?

“A. I don’t recall.

“Q. Was anybody with you when you picked

(Deposition of Harold Dee Jensen.)

it up?            "A. Yes.

"Q. Who?

"A. There were several firemen.

"Q. Anybody else?

"A. There were others around.

"Q. Could you identify any of them?

"A. No, I can't.

"Q. This was in the office upstairs?

"A. Yes.

"Q. How many people were up there?

"A. I would say half a dozen.

"Q. Now, can you identify any of the people that weren't firemen? [608]

"A. That weren't firemen?

"Q. Yes.

"A. No, I can't, because some of them were volunteer firemen.

"Q. Did you show the accounts receivable book to any of them?            "A. I don't recall.

"Q. Then what did you do with the book after you picked it up from the desk?

"A. Oh, I tried to reconstruct it as much as possible.

"Q. Where did you take it?

"A. I don't recall.

"Q. Did you take it out of the building?

"A. Yes, I took it out of the building.

"Q. And then where did you take it?

"A. I don't recall.

"Q. Where is the last place you saw the accounts receivable book?            "A. 2434 E Street.

(Deposition of Harold Dee Jensen.)

“Q. And when was that, approximately?

“A. It was sometime after the fire.

“Q. About how long after the fire?

“A. Approximately a month. [609]

“Q. Was that the last time you saw that accounts receivable book?

“A. Yes, as near as I can recall.”

Mr. Castro: At this time counsel agreed to stipulate concerning the two electric motors which are on page 5 of the inventory, your Honor. Will it be stipulated, Mr. Hilger, that the two electric motors, valued at \$600 and \$700, respectively, at page 5 of the inventory, Schedule A, were from the Hill and Morton, Inc., and that following the fire on August 31, 1956, the Hill and Morton Company originated a claim for each of such motors with its insurance carrier for such motors, and the insurance carrier for such motors was the American National Fire Insurance Company, and on another date, February 25th, 1957, a proof of loss was received from Hill and Morton by the American National Fire Insurance Company in the amount of loss and damage of \$1,130 and it was paid under a draft paid February 19, 1957, to Hill and Morton and Bank of America National Trust and Savings Association in the amount of \$1,130, being Policy No. 151093. The other item which was involved with the two motors was a planer, and the planer was not damaged in the fire.

Mr. Hilger: Nor was it included on a proof of

loss filed with the Boston Insurance Company herein.

Mr. Castro: That is correct, but the two motors were.

Mr. Hilger: That would be the testimony of [610] Hill and Morton if called. I will so stipulate.

Mr. Castro: That, I believe, your Honor, concludes the evidence on behalf of the defendant. Mr. Driscoll apparently has not called back concerning the Eureka Redwood invoices. If they should turn up before they start arguing the case, we will ask that it be made available.

The Court: Any rebuttal testimony?

Mr. Hilger: Yes, your Honor, unfortunately. I do not like to do this but I think I am going to have to either testify or have my testimony stipulated to concerning certain records connected with Mr. Stearns' examination and in connection with the inventory as revealed on the financial statement that has been introduced in evidence, for the purpose of establishing inventory.

The Court: Of course, if you testify you would not be able to argue that part of the case that has to do with your testimony. Can you make some statement of what you wish to testify to?

Mr. Hilger: Simply that I have no recollection of any demand being made for the production of invoices relating to the cash disbursements shown to the account of Harold Dee Jensen, nor that I have knowledge that such a list was even or had been prepared by Mr. Stearns except through the members of my office staff, who observed Mr. Bre-

dal of his office handling those checks. My recollection is that on September 18th or 19th [611] was the first reference made to the cash book in my office.

Likewise the financial statement of June 1st, 1956, reflected only inventory that was in the building, the retail stock, so to speak. The wholesale operation was conducted on a carload basis, and the items were handled accounting-wise as in transit items, the goods being held only for a few days in the yard of the Eureka Lumber Company where they were either resorted, regraded, or reclassified and then shipped out with settlement, the purchase and the sale of the lumber being made through one invoice through the office of Hill and Morton or otherwise; that on the books of record in the usual wholesale instance neither the inventory nor the accounts payable covering that inventory would ordinarily be reflected upon the books of account of the Eureka Lumber Company prior to the time of the fire and would not appear until the sale was recorded and disbursement made.

The Court: That would be the substance of your testimony?

Mr. Hilger: That is correct.

Mr. Castro: Since Mr. Hilger was not the accountant for the firm or taking care of the books, I cannot accept any such statement, your Honor.

The Court: I think you are right about that. You did make some statement about his recollection of demand being made. [612]

Mr. Castro: He said he had no personal recol-

lection of Mr. Stearns asking him for a specific record relating to H. D. Jensen. It could possibly have occurred when Mr. Bredal, who is the other party——

Mr. Hilger: Mr. Thomas of my office accompanied Mr. Bredal and Mr. Stearns through the Eureka Lumber Company plant upon the occasion of their visit in October. I have no recollection at all of even a list of cash disbursements to Harold Dee Jensen being prepared. It was certainly not revealed to me until I discovered it through the observation of some of my office staff, who saw them do it, which revelation was made to me only after they had departed. I have no recollection of any such request being made of me.

Mr. Castro: Can you give us the approximate date when you discovered the account of Harold Dee Jensen?

Mr. Hilger: It would have been some three or four weeks after, whenever we got the transcribed portion or, rather, the transcribed record of Mr. Hyrum Jensen's examination under oath.

Mr. Castro: Will you stipulate that that occurred during the month of November, 1956?

Mr. Hilger: I could not stipulate to that. It would be somewhere at about that time that I first became aware that Mr. Stearns had even made such a list, and I was at that time totally unaware of any request. It would be about the 6th day [613] of December when I got around to read that. It would have been the 10th or 11th of November. But at that time I was still aware of only one thing:

Mr. Bredal had been observed making a list of certain disbursements. But I was aware of no requests for invoices covering it.

Mr. Castro: We will stipulate, your Honor, that Mr. Hilger, if called as a witness for the plaintiff in this case, would testify that he has no recollection as to whether or not Mr. Stearns made a specific request for invoices relating to moneys which were on deposit in the Harold Dee Jensen account; that subsequently after the visit of Mr. Stearns in October, 3rd, 4th or 5th, 1956, Mr. Hilger was informed by Mr. Thomas of his office that certain notations had been made concerning Harold Dee Jensen's deposits, and that Mr. Hilger did not learn any more about them until after he received the examination under oath, which was on or about November 6th, 1956.

Mr. Hilger: On or a few days after November 5th or 6th, 1956, was the first time I became aware that a series of notations had been made.

Mr. Castro: So stipulated, your Honor.

The Court: Very well. But the other part of your offer, Mr. Hilger, I think counsel is right about that.

Mr. Hilger: It comes from discussion actually with Mr. Harold Dee Jensen, who did discover the records during its lifetime. [614]

The Court: I think that would be inadmissible. That would be all you would have then by way of rebuttal?

Mr. Hilger: Yes, your Honor.

The Court: The evidence having been concluded,

I think I shall excuse the jury until tomorrow morning because there are some legal matters I want to discuss with counsel and you will want some time to prepare what you want to say to the jury. This is a difficult enough case anyhow for the jury to follow, I think there should be some thought given to the manner in which it should be presented to the jury. So I think it would be better that the jury be excused until tomorrow morning. You could not conclude the case so far as submission to the jury is concerned to the jury today anyhow. I think it would be more adequately handled from the point of view of presenting it to the jury if you had the jury for longer than this afternoon. So will you come back tomorrow morning until 10:00 o'clock. The Court will remain in session.

(The jury was thereupon excused.)

(The following occurred in the absence of the jury:)

The Court: If you do not mind, gentlemen, we might take these matters up now and save your coming back again this afternoon. That will give you an opportunity to spend your time in the afternoon preparing what matters you wish to present. The main thing is the question of instructions the Court should give the jury in this case. [615]

Mr. Castro: Your Honor, I would like to make a motion for a directed verdict at this time in regard to certain matters.

The Court: I will hear you on that.

Mr. Castro: At this time the defendant Boston Insurance Company moves the Court to direct a

verdict in favor of the defendant Boston Insurance Company upon the grounds that the uncontradicted evidence establishes that the plaintiff has not complied with the conditions of the policy concerning what an insured is required to do after a fire has occurred and the loss has been sustained. In this instance I point out to the Court the policy provisions are under Insurance Code 2071, the Insurance Code of the State of California, and under the clause of the policy relating to requirements in case loss occurs, the language there is mandatory. The word "shall" is used, and the insured is required to produce books of account and is required to produce bills, statements, invoices and other vouchers relating to the items listed in the proof of loss, and if the original documents are destroyed, he is required to produce copies at such reasonable time and place as may be designated to permit the defendant to make abstracts therefrom.

(Counsel for the respective parties argued the merits of the motion, afterwards the Court made the following ruling:)

The Court: I will deny the motion for a directed verdict. [616]

Mr. Castro: The other motion I had in mind, your Honor, would relate to specific items in the inventory which perhaps your Honor is going to discuss at the time of talking about the instructions.

(Thereupon Counsel for the respective parties proceeded to discuss with the Court the instructions to be given to the jury.) [617]

Tuesday, October 1, 1957—10:00 A.M.

(Counsel for the respective parties thereupon proceeded to argue the case to the jury, afterwards the Court instructed the jury as follows:)

### INSTRUCTIONS TO THE JURY

The Court: Members of the jury, I will ask you to give me your attention for a few moments. Some of you are new to jury duty. A few of you have had some prior experience, and there are some general observations that I would like to make to you concerning this case, some of which are applicable to all cases and some of which particularly apply to this case. It is very obvious to me that you have given your undivided attention to the evidence that has been presented here and to the arguments of the attorneys. To some of you this has been somewhat of a unique experience for the first time of jury duty to be confronted with a case that might appear at first blush to be somewhat complicated, but which, like all cases, finally resolves itself down to some outstanding issues that you can well determine.

The function of the jury in a case of this kind, as it is in all cases, is to determine the question of fact that is presented and the question of fact in this case is should the plaintiff recover from the insurance company, and if so, how much. The Judge ordinarily does not interfere or [618] assume any prerogative of deciding that question of fact. That is for the jury exclusively to determine. You are

not to draw any conclusions from anything I may have said during the course of the trial in ruling on objections or in connection with propounding inquiries myself that I was intending to indicate to you in any way what your verdict should be. Such was not the intention of the Court. Whatever was said in that regard was only for the purpose of supervising the trial of the case, and, if possible, to expedite it. You must make your own decision on the factual question.

Just as you have sole and exclusive function of determining the facts in the case, so it is exclusively the function of the Judge to advise the jury as to what the law is that is applicable to the case, so that the jury may be aided thereby in determining the question of fact which the jury has to determine, and the statement of law as the Judge gives it to you, you must accept. You have to assume, rightly or wrongly, that the Judge knows what he is talking about when he tells you what the law is, and you must apply it to the facts of the case. I mention that to you because it sometimes happens that jurors come into the jury box with some preconceived notions about social, economic or legal theories and they decide what they think the law should be and then proceed to decide the case accordingly. That is wrong, and that is why I have to emphasize to you that so far as the statement of [619] law is concerned, you are bound by what the Court tells you the law is.

Even though we have somewhat different functions to perform, you deciding the questions of fact

that are presented and the Judge giving you the law here, we are nevertheless in a sense a team because our objective is the same, that is, we want to see justice done and that a just result shall obtain in the case before the Court.

In your deliberations in determining this case you should wholly exclude all matters that appeal to your sympathy and likewise anything that might possibly appeal to your prejudices. You must not decide the case because you have sympathy for one side or the other or prejudice of some kind against one side or the other. You must decide the case solely on the basis of the evidence you have heard here in this case.

There are some general rules that apply in all civil cases, and I am going to very colloquially and simply give them to you. I rarely in the many years I have been here read complicated and long legal statements to juries. Some do that. I do not quarrel with that system. They have a right to do that. But I feel that when we draw into our jury boxes men and women from all walks of life, they should be told about the applicable law in language that they ordinarily use and not in the language of the law books, which, I may say to you, Judges themselves are frequently in dispute about. So [620] what I have to say to you in this field may hereafter not read as well as the instructions in a case of those who read long, written statements to you, but I have an abiding conviction that juries better understand it and can better do justice if they are advised in the language that we ordinarily use, because it

cannot be expected that twelve men and women can be brought into a jury box in a case and suddenly by some divine inspiration in 15 or 20 minutes or a half hour be inoculated with a complete knowledge of the law appertaining to the case. That is just impossible.

Whether or not you believe the witnesses who have testified in this case and the extent to which you believe them is a matter for your sole and exclusive judgment, and the amount of weight to be attached to the testimony of the witnesses is something that you yourself have the exclusive power to decide. We always start out with the presumption in every case that when a witness comes up and sits in this chair he or she is going to tell the truth. However, that presumption can be put out of the way and disappear by a number of different factors. You may consider the witness' demeanor on the witness stand, the manner of testifying of the witness, whether or not the witness contradicts himself, whether or not he is contradicted by the testimony of another witness, and what his interest in the case may or may not be. All of those factors you can take into account when you evaluate how much weight you want to give to the testimony of the witness, [621] so that you can determine whether or not, when the witness leaves the stand, he is still clothed with that presumption that he had when he got in the witness chair, namely, that he was going to tell the truth. If you find and conclude that some witness testified falsely in some material respect, you have the right to, and you are justified in dis-

regarding all of the witness' testimony. You should not, however, resort to that unless you are satisfied that the falsity was in some material matter that definitely affects the outcome of the case.

This is a civil case. It is a suit brought by the plaintiff, who was insured under an insurance policy by the Boston Insurance Company, and he is suing here because he claims that under the terms of the policy of insurance which he paid for that he had a loss by fire which is compensable under the terms of the policy, and he has filed a claim with the insurance company for the amount of the loss which he claims he suffered by fire, and not having been paid that amount he has filed suit. So it is for your determination in this civil action whether or not he shall recover, and, if so, to what extent.

In every civil case the burden of proof is upon the plaintiff. He must prove his case by a preponderance of the evidence, the law says. By that we mean that the evidence on his side, when weighed with the evidence on the other side, [622] must have more convincing weight and effect, and if it does have more weight and convincing effect than the evidence on the other side, then the plaintiff has sustained the burden of proving his case by a preponderance of the evidence. Otherwise he has not. That does not mean that the man who has the biggest number of witnesses has the preponderance of the evidence, because preponderance of evidence does not depend upon the number of witnesses. It depends upon the quality of the testimony. It might well be that in a case in which there is only

one witness on one side and 30 witnesses on the other side the testimony of the one witness might have more convincing weight and effect than the testimony of the 30 witnesses on the other side of the case. So I repeat to you in determining the matter of preponderance of evidence you should judge by the quality of the testimony rather than by the quantity of it.

It is your duty in this case as in all civil cases—in fact in all cases—to disregard any testimony that has been stricken out by the Court or any answer to a question where the Court has sustained an objection to the question. You should only consider the evidence that has actually been produced here by the witnesses, from the mouths of witnesses, exhibits, plus any stipulations that counsel have made as to facts in the case, and a stipulation has the same effect as if it were testimony given. [623]

The attorneys in this case, as is their right and indeed their duty, have argued the case to you. If, however, you should feel that there is any discrepancy between the statement of the evidence as made by the attorneys and the evidence as you recall it as having been given by the witness, then you should disregard the statement of the evidence as made by the attorneys and only consider the evidence as you recall it as having come from the mouths of the witnesses or by other evidence.

As I have stated to you members of the jury, this is a case of a suit on an insurance policy. As presented here there are several different questions that have been tendered by the pleadings, which are

the written documents that the parties have filed in the case, and also by arguments of the attorneys, too. I would say to you that the main issues that were tendered in this case are, What was the amount of the stock on hand of the plaintiff at the time of the fire? What was the extent of the damage by fire? What was the cash value in dollars of the loss sustained? Did the plaintiff debar himself from recovery because of any deliberate or purposeful exaggeration or over-statement of his claim to the insurance company? And should the jury consider the claim of the insurance company that the plaintiff debarred himself from recovery by allegedly setting or conspiring to set the fire that caused the damage in this case? [624]

Now, members of the jury, the amount of the stock of merchandise on hand at the time of the fire in this case is in dispute. I mean by that that one side has claimed one certain amount and the other side has disputed that and claimed that there was a different amount on hand. The plaintiff claims that he had stock on hand that was worth considerably more than the maximum amount of the policy, which was \$20,000. The defendant claims that the plaintiff falsified the amount of merchandise on hand, particularly redwood lumber in the shed, with the intent to defraud the insurance company. The jury must resolve this issue and, as best it can from the evidence, determine the amount on hand and the cash value of the alleged damaged stock. If the jury should find from the evidence that the plaintiff purposefully and deliberately padded or exagger-

ated his claim to a material extent in order to cheat or defraud the insurance company, the plaintiff cannot recover, but any difference between the amount claimed and the actual amount of the inventory, if there be such a difference, cannot be considered as the basis for debarring recovery if such differences are the result of honest evaluation or based upon conflicting or differing opinions as to the amount and value. The burden of proving any alleged willful or fraudulent padding of his claim by the plaintiff rests upon the defendant.

In determining the loss or damage to the sawmill which you have heard about, and which the lawyers have talked [625] to you about, which the plaintiff claims to be \$7,500, being the amount for which the plaintiff claims to have sold the sawmill, the defendant a much smaller sum, the jury is entitled to consider the cash value of the sawmill at the time of the fire not exceeding the cost of repair or replacement with material of like kind and quality within a reasonable time after the fire. The cash value of the sawmill may legally be considered to be the price at which the mill had been sold by the plaintiff.

The defendant claims that the plaintiff has not complied with the policy of insurance by not producing all of the records which the defendant demanded, and thereby has debarred himself from recovery in this action. Whether or not the plaintiff has so complied with the policy is a question of fact for you to determine from all the facts and circumstances disclosed by the evidence. If you find that

the plaintiff substantially and willfully failed to produce material records within his power to produce, then you may find for the defendant; otherwise not. Stated somewhat differently and on the other side, as it were, you should not find in favor of the defendant on this issue unless you are convinced by a preponderance of evidence that the plaintiff willfully failed to produce records which were material to his claim of loss and within his power to produce. The defendant has the burden of proving such failure on the part of the plaintiff. I mean [626] by that the defendant has the burden of proving that the plaintiff has substantially and willfully failed to produce records within his power to produce.

The defendant has urged as a special defense in the pleadings on file here that the plaintiff set or conspired to set the fire. This charge was made in writing in defendant's answer and was urged by defendant's counsel in his opening statement to you at the beginning of the trial. Ladies and gentlemen, this is a serious charge and amounts to charging the plaintiff with the commission of a crime, to wit, a felony. Such a serious charge should not lightly be made. I instruct you that as a matter of law the defendant has failed to present any substantial evidence to sustain such a charge, nor is there any substantial evidence from which an inference as to the truth of such charge can be drawn. Therefore it is my instruction to you to disregard the claim of the insurance company in this regard, and you should not consider it in any way in determining the issues in this case.

Members of the jury, if you decide that the plaintiff should recover and is not debarred from recovery by reason of the application of any of the other principles of law which I have given you, then you will determine from all the evidence the amount to be awarded to the plaintiff, not exceeding the principal amount of \$20,000 which was the amount of the insurance policy. [627]

Members of the jury, I think I have given you as much advice as I think in this particular case is appropriate and needful for you to have in resolving this case. There are many principles of law that are applicable to insurance cases, that involve insurance policies, that might be apropos in other cases, but I think that I have to the best of my ability given you what I think is helpful to you and necessary for you to have in this particular case.

When you retire to the jury room to deliberate you should select one of your number as a foreman or forelady, as the case may be, and he or she will preside over your deliberations in the jury room and will represent you in the further conduct of this case and will sign your verdict for you when you have reached a verdict. You should endeavor to conscientiously try to arrive at a verdict in the case. You should freely consult with one another in the jury room. Each side is entitled to the independent judgment of each one of you. Nevertheless in the jury room if you should be convinced that your view of the case is wrong, you should not be stubborn and still adhere to your view because you had that view. On the other hand, if after a free ex-

change of ideas you believe that the view you have is right, you should stick to it. It is your right to do that.

We have prepared for you two forms of verdict for your assistance. One form of verdict reads, "We, the jury, [628] find in favor of the plaintiff and assess the damages against the defendant in the sum of blank dollars." If you find in favor of the plaintiff, you will write in the amount of the award in the blank space and your foreman will sign it for you and that will be your verdict.

The other form of verdict reads, "We the jury find in favor of the defendant." If you decide the plaintiff is not entitled to recover, that is the form of verdict you will use, and that form of verdict will be signed by your foreman if you agree to it. Your verdict must be unanimous. In the Federal Court we do not have a system of a three-quarters verdict as in the State Courts. Therefore you should not return to the courtroom with a verdict from the jury room unless in the jury room all of you have agreed to the verdict.

After you have retired and have selected a foreman, if you wish to see any of the exhibits in the case you may send word through the bailiff and the Court will see to it that they are sent to you.

Does either side wish to note any corrections? It may be I shall want to correct or change or add something to what I have told you after consultation with the counsel in the case, so I will excuse the jury temporarily at this time. Please mind the case is not yet submitted to you. You are not yet to dis-

cuss the case among yourselves or to form or express an opinion concerning it. I will bring you back again in a [629] few minutes and let you know if I have anything further to say to you.

(Thereupon the jury was excused from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Hilger: Your Honor, in giving the instruction regarding the maximum verdict no mention was made of the possibility that the jury could award interest as well. I do not know how we should handle that.

The Court: I do not think that that is a matter for the jury to determine, whether interest should be allowed or not. If there is a verdict for the plaintiff in the case, for whatever amount it is, the Court would allow interest upon your application to be added to the judgment, but I do not think the awarding of interest is anything more than a legal matter.

Mr. Hilger: My experience in a contract action interest to the time of judgment has been left to the discretion of the jury as to whether or not they wish to add it.

The Court: I have never done that. I have never heard of it being done in the Federal Court. I think that could be cured by the fact that if the jury returns a verdict in favor of the plaintiff for a principal sum, if under the law the plaintiff is entitled to interest from the time of the breach, failure to pay, the Court would allow it and add it to [630] the judgment. I may be in error on that, but I have

never seen it left to the jury to determine whether interest should be allowed, because that has always been considered a matter of law.

Mr. Hilger: That is the point, I wanted to get that cleared up. Thank you.

The Court: Mr. Castro?

Mr. Castro: Yes, your Honor. There was a statement of fact which your Honor made that I believe is incorrect, namely, the plaintiff had paid for the insurance involved. The premium was unpaid. There has been no evidence in the case, your Honor, that the premium was paid.

The Court: The policy was in force and effect. You both assured me of that fact.

Mr. Castro: Yes, but there was no payment of premium for it. There has not been any premium to this date paid.

The Court: You mean the policy was just in force?

Mr. Castro: The premium had not been paid prior to the fire.

The Court: Do you think that is of some moment? Do you wish me to correct that? I would suggest there is no particular point in emphasizing it. However, if you wish me to correct it, I will. I assumed the fact that the policy was in full force and effect, presumptively the premium had been [631] paid.

Mr. Castro: The second point I have in mind is your Honor instructed on the failure to comply with the demand for books and invoices. However,

you stated that the burden of proof would be upon the defendant to show that failure to comply.

The Court: Failure to comply with the California Insurance Code willfully and purposefully. That is what I said to them. I have it written down.

Mr. Castro: Yes, your Honor.

The Court: I did not say the burden was on the defendant to show that the plaintiff had not produced books and records. I said that the burden was on the defendant to prove that the plaintiff had willfully failed to produce material and records.

Mr. Castro: Then I think the jury should be instructed on the subject that it is not a question of willfullness as to the production of books, records and invoices. Those are conditions of the policy which have to be met, if those records were available.

The Court: I think I will stand on the instruction I gave. I think that was a fair instruction.

Mr. Castro: With reference to the other instruction which I have in mind, we proposed an instruction defining stock within the meaning of the policy, which is what the insurance [632] policy covers, and not equipment. The Court did not give an instruction in defining what is meant by stock under the policy, and in particular I have reference to—

The Court: The welder?

Mr. Castro: The welder, yes, your Honor.

The Court: Do you want me to give an instruction particularly on the welder that, if it was used in the business, it was not covered by the policy, but if it was part of the stock in trade it would be?

Mr. Castro: Yes, your Honor.

The Court: Do you want me to give that?

Mr. Castro: Yes, I think it should be.

The Court: I will give that instruction. I did not get down to that minutia in instructions. That was all.

Mr. Castro: Then, your Honor, we proposed several instructions, one of which was instruction number five with reference to whether compliance with the conditions of the policy is mandatory. That is entitled "Meaning of the Word 'Shall'".

The Court: I do not consider that a necessary instruction.

Mr. Castro: The instruction number three relates to the subject I have already discussed with the Court concerning compliance with the conditions of the policy before recovery has been made. [633]

The next instruction, number four, relates to the same problem concerning burden of proof. Has he sustained burden of proof that he has met with the conditions of the policy?

The next instruction is number six was not covered.

The Court: Do I understand, so your record may be complete, you are excepting for failure to give those instructions?

Mr. Castro: That I am now noting.

The Court: Because, you see, I will file your proposed instructions so that your reference to them by number would be identifiable.

Mr. Castro: Fine. That would be instruction six, the failure of the insured, the plaintiff, to take care

of the property and the suggestion in the testimony that certain properties were taken by theft.

Instruction number eight, relating to concealment and fraud as defined by the policy.

Instruction number seventeen, what the effect of the plaintiff in having special knowledge concerning the subject matter of the inventory is.

Instruction number fifteen, relating to a misrepresentation.

Instruction number twenty, defining when disclosures by the plaintiff are required. [634]

Instruction number eighteen, defining what is meant by the term "Concealment."

Instruction number nineteen, dealing with the elements of intent and concealment.

Instruction number twenty-one, dealing with the elements of materiality and the concealment.

Instruction number twenty-four, relating to the use of circumstantial evidence in fraud, misrepresentation and the concealment. I believe that covers each of the matters that I have in mind, your Honor.

The Court: Very well. All the exceptions will be noted. Will you bring the jury back and I will instruct them about the welder.

(Thereupon the jury was returned to the courtroom and the following proceedings were had in their presence:)

The Court: How much was that welder?

Mr. Hilger: \$759.

The Court: Members of the jury, there is one matter, somewhat minor in its nature, although

nevertheless of importance, that I neglected to give you an instruction on. One of the items that is claimed by the plaintiff and placed on the black-board by the attorney for the plaintiff was a welder, \$759. There is some dispute between the parties as to whether or not this was a part of the stock in trade of the plaintiff or whether or not it was a piece of equipment that [635] was used on the premises. The value of the welder, if you go into the question of determining the value of the inventory, if you find from the evidence it was part of the stock in trade, you may take it into consideration as a part of the claim evaluated in this case. If on the other hand you find from the evidence in the case it was a part of the equipment used in the conduct of the business, then it is not covered by the terms of the policy and you should disregard it. That is a question of fact with respect to the welder which you would have to determine. Otherwise the instructions I have given you are complete, and you may now retire and consider your verdict.

(Thereupon, at 2:40 p.m., the jury retired from the courtroom to deliberate upon their verdict. At 6:00 p.m. the jury returned to the courtroom, and in the presence of the Court and counsel for the respective parties the following occurred:)

The Court: The Court is in receipt of the following indication from the jury:

“Testimony on all welders, further instructions on the term ‘fraud’ in relation to employer-employee.”

That last request is amplified by the following statement:

"Is employer responsible for possible [636] mis-statements or fraud of an employee on a statement or document if the employer signs the document?"

Gentlemen, do I understand that what you want is the testimony on all of the welders? Is that what you mean?

The Foreman: Yes, your Honor.

The Court: You need not stand up. I wish to advise you, with the consent of counsel, that there is only one welder that is involved in the case, because only the value of one welder is claimed as a loss. There were other welders, but the plaintiff has not claimed any loss on those welders because they were equipment. As I explained to you in my instructions, the one welder in question, the problem for you to decide is whether or not that was stock in trade or a piece of equipment used. If it was stock in trade, it would be properly includable in the claim of loss, but if it was a piece of equipment it would not. So I do not quite understand what the need is for the jury to hear testimony, if there is any, on any welders that are not involved in the claim. If you wish to hear any testimony with respect to the one welder in question, the reporter has found what he thinks is the testimony in that regard and will read it to you.

The Foreman: There seems to be confusion, your Honor, regarding welders. Some think there were three.

The Court: I know, but I just explained to you,

as [637] I did at the time of the instructions, that there is only one welder with which you are concerned. There is no use of your spending your time considering something that is not involved in this lawsuit.

The Foreman: May we have that testimony read?

The Court: All right.

(Thereupon the reporter read the following portions of the record: Page 59, line 3, to Page 60, line 15.)

The Court: All right. Is there any other testimony with respect to that welder that you have been able to locate, Mr. Sweeney?

The Reporter: No, your Honor.

The Court: Members of the jury, with respect to the inquiry which you have made, "Is employer responsible for possible misstatement or fraud of employee on a statement or document if the employer signs the document," I must say to you that I am unable to answer that question. That is an abstract question of law and it could not be answered by any Judge in my opinion without reference to the particular facts and circumstances. I do not know what the jury has in mind with respect to the matter, and I will go no further than to say that the Court is unable to give you any advice on an abstract principle of law, because there may be a dozen cases in which there might be responsibility and there might be another dozen cases in which there might not be responsibility. [638] Each case would stand or fall on its own, and I am not in a

position to give you an instruction on some abstract principal of law such as that. You will have to work out your conclusion on the basis of the instructions which I have heretofore given you.

It is now 6:15. If you have not been able to agree on a verdict as yet, and if you are hungry, I will arrange for the bailiff to take you to dinner now and you can resume your deliberations after dinner. What is your view on that? Would you prefer to go to dinner or would you prefer to resume your deliberations for a while? Mr. Foreman, you might quietly convass the jurors and see what they want in that regard.

(The jurors spoke among themselves in a voice inaudible to the reporter.)

The Foreman: Your Honor, we would like to continue deliberating for a while.

The Court: All right. You may resume your deliberations.

(Thereupon the jury retired to continue their deliberations, and at 6:40 p.m. the jury returned to the courtroom, and in the presence of the Court and counsel for the respective parties the following occurred:)

The Court: Members of the jury, have you reached a verdict?

The Foreman: Yes, we have, your Honor. [639]

The Court: Will you hand the verdict to the Deputy Marshal.

(The verdict was handed through the Deputy Marshal to the Court.)

The Court: Will you read the verdict to the jury, Mr. Clerk.

The Clerk: Yes, your Honor. Ladies and gentlemen of the jury, harken to your verdict as it will stand recorded:

“We the jury find in favor of the plaintiff and assess the damage as against the defendant in the sum of \$20,000.”

Is the verdict as read the unanimous verdict of all the jurors in the jury box?

(All jurors indicated that it was his or her verdict.)

The Court: Do you wish the jury polled?

Mr. Castro: Please, your Honor.

(Thereupon the jury was polled, and as the name of each juror was called, he or she answered that the verdict was his or her verdict.)

The Court: The twelve jurors having answered in the affirmative, the verdict as read is the verdict of the jury. The Clerk may enter the verdict. Before the jury is discharged today I would like to have read into the record a communication which I have received from the jury while it was deliberating. The question was, “Is interest applicable on [640] amount awarded to plaintiff?” That is signed by the foreman. To which the Court responded as follows: “Interest is an item within the Judge’s power to allow, since decision as to whether interest should be allowed is a matter of law.”

Members of the jury, the Court wishes to thank you for the attention that you have given this case and for the many days that you have spent here

and your prompt attendance at the times fixed for the various hearings. I do not know when you will be called upon for further jury duty, but when that time comes you will get the news from the United States Marshal. I won't keep you any longer. You are free to go now.

(Thereupon the jury was excused, and after they had left the following occurred:)

The Court: Mr. Castro, do you wish a stay of execution?

Mr. Castro: Yes, your Honor. I discussed it with Mr. Hilger and I think it is satisfactory with him.

The Court: Very well, and on your question of interest, you might make some motion in regard to interest. I do not know what the view of counsel on the other side would be. Maybe you would prefer to defer that.

Mr. Hilger: At this time, in view of the distance between my office and the place where the Court is sitting, if I might at this time apply to the Court and move for the [641] allowance of interest from October 22, 1956, on the basis that the cause of action accrued and the money became due on that date, and under the authorities cited in the pretrial memorandum heretofore filed in this action, the debt being due on that day, and having been ascertained to have been due, it is the feeling of the plaintiff that interest is in order and should be allowed.

The Court: Do you wish to oppose that?

Mr. Castro: I have no authorities to cite to the contrary at this time.

The Court: Very well. I will grant your motion

then. The clerk will have to calculate the interest. The Court will allow interest on the judgment from October 22nd—is there any dispute about the date?

Mr. Castro: 60 days after the receipt of proof of loss, which I think was August 24th.

Mr. Hilger: That is correct.

The Court: The Court will allow interest and the clerk will enter as a part of the judgment interest on the amount awarded by the jury at seven percent from October 22nd, 1956, to the date of judgment.

Mr. Hilger: Thank you, your Honor.

(Thereupon the Court adjourned.) [642]

[Endorsed]: Filed January 17, 1958.

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[Endorsed]: No. 15820. United States Court of Appeals for the Ninth Circuit. Boston Insurance Company, a corporation, Appellant, vs. Hyrum Jensen, individually and doing business as Eureka Lumber Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: December 11, 1957.

Docketed: December 18, 1957.

Reporter's Transcript filed January 21, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15820

BOSTON INSURANCE COMPANY, a corpora-  
tion, Appellant,

vs.

HYRUM JENSEN, individually and doing busi-  
ness as Eureka Lumber Company, Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Appellant intends to rely on the following points  
in this appeal:

1. The evidence was sufficient to submit to the jury the issue whether Appellee and Harold Dee Jensen entered into a conspiracy to and did set fire to the insured property to defraud Appellant.

2. The evidence was sufficient to submit to the jury the issue whether Harold Dee Jensen wilfully set fire to the insured property.

3. Evidence offered by Appellant of the financial condition of Appellee and Harold Dee Jensen was admissible to establish motive on the part of Appellee and Harold Dee Jensen to form a conspiracy to and set fire to the insured property to defraud Appellant; and to establish that Appellee did not have the financial ability to acquire the inventory set forth in his Proof of Loss.

4. The Court erred in allowing the witness A. J. Franceschi to testify as to the credit rating of Appellee and the ability of Appellee to repay loans.

5. Evidence offered by Appellant as to (a) the transfer of trucks by Appellee to H. D. Jensen following the fire; and (b) the written agreement between Appellee, Harold Dee Jensen and others set forth in Ex. J for identification was admissible to establish the conspiracy and to impeach Appellee.

6. Evidence offered by Appellant to show that Appellee breached the conditions of the insurance policy, entitling Appellant to examine H. D. Jensen under oath, by knowingly causing Harold Dee Jensen not to appear for such an examination under oath as scheduled by Appellant was admissible.

7. The Court erred in instructing the jury that the burden of proof was upon Appellant to establish that Appellee "wilfully" did not comply with the request of Appellant to produce books of account, bills, invoices and other vouchers relating to the items listed in the Proof of Loss.

8. The motion of Appellant for a directed verdict against Appellee should have been granted in that the evidence showed as a matter of law, that Appellee did not perform the conditions of his insurance policy, relating to the production of books of account, bills, invoices and other vouchers covering the "out of sight" items in the Proof of Loss; and as to the examination under oath of Harold Dee Jensen.

9. The Court erred in refusing to allow Witness

Mrs. Ella Van Harper to testify to a conversation with Harold Dee Jensen concerning the accounts receivable book after the fire.

10. The Court erred in refusing to strike from the record a voluntary statement by Appellee that a statement by counsel for Appellant in an offer of a proof was a lie.

11. The Court erred in refusing to allow Appellant to cross examine Appellee as to the following matters:

- (a) Cost of fence boards;
- (b) Metal Items listed as a total loss in the Proof of Loss;
- (c) Diesel engine which was a part of a sawmill;
- (d) The amount of credit received for the sawmill from Dayton Murray Truck Sales;
- (e) The outside doors in the damaged building; and
- (f) The time the fire originated.

12. The Court erred in allowing Appellee to testify as to conversations outside of the presence of Appellant relating to:

- (a) Unidentified persons seen at the scene of the fire;
- (b) A potential order for redwood molding from Russ Sharp.

13. A motion by Appellant to reopen the evidence to show that two (2) electric motors listed in the Proof of Loss were owned by Hill & Morton,

Inc., a corporation, (and not Appellee) should have been granted.

14. The motion of Appellant for Judgment Notwithstanding the Verdict should have been granted.

15. Jury Instructions numbers 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 36, 37 and 38 proposed by Appellant should have been given.

16. The testimony of Dayton Murray, Jr. relating to the sawmill listed in the Proof of Loss was inadmissible on the ground of hearsay.

Dated: January 10th, 1958.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant and  
Third Party Plaintiff.

Certificate of Service by Mail attached.

[Endorsed]: Filed January 10, 1958. Paul P. O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD  
DEEMED BY APPELLANT TO BE NECESSARY  
FOR THE CONSIDERATION  
OF THE APPEAL

Pursuant to Rule 17 (6) appellant designated the following parts of the record deemed necessary for the consideration of the appeal:

1. Complaint.

2. Answer.
3. Third Party Complaint.
4. Answer of Third Party Defendant, Hyrum Jensen to the Third Party Complaint.
5. Answer of Third Party defendant Harold D. Jensen to Third Party Complaint.
6. Defendant's proposed instructions #3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 36, 37 and 38.
7. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.
8. Verdict.
9. Judgment entered on verdict.
10. Motion of defendant for Judgment Notwithstanding the Verdict or, in the alternative, Motion for a New Trial.
11. Order denying Motion of Appellant for Judgment Notwithstanding the verdict or, in the alternative, Motion for a New Trial.
12. Plaintiffs' Exhibits 1 to 21 inclusive.
13. Defendants' Exhibits A to Z inclusive, and AA to AY inclusive.
14. Reporter's transcript should include the following objections noted in the depositions of Dayton Murray, Jr. and A. J. Franceschi.

(a) Deposition of Dayton Murray, Jr. page 8 line 10 to page 9 line 10:

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Deposition of Dayton Murray, Jr. page 18, line 13 to page 19 line 20:

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Deposition of A. J. Franceschi page 3, lines 1 to 3:

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15. Notice of Appeal.

16. Designation of portions of the record, proceedings and evidence to be contained on the record on appeal.

17. Designation of parts of record deemed by appellant to be necessary for consideration in the appeal.

18. Statement of the points on which appellant intends to rely.

19. All other records required by the provisions of Rule 75 (g) of the Federal Rules of Civil Procedure.

Dated: January 10th, 1958.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant and  
Third Party Plaintiff.

Certificate of Service by Mail attached.

[Endorsed]: Filed January 10, 1958.